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IN THE

SUPREME COURT OF THE UNITED STATES

73rd Term

No.

Charles Dewey Altsman
and
John J. AGUIRRE
Petitioners

v.

State of Texas, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TABLE OF CITATIONS

Cases:

Alberti v. State, 495 SW. 2d 236 (Tex. Crim. App. 1937)

American Federaton of Labor v. Mann, 188 S.W. 2d 276 (Tex. Civ. App. - Austin 1945, No writ).

Archer v. State, 474 S.W. 2d 484 (Tex. Crim. App. 1971)

Baker vs. State, 1972, 478, S.W. 2d 445
Broom v. State, 463 S.W. 2d 220 (Tex. Crim. App. 1971)
Brown v. Board of Education, 347 US 483 (1954)
City of New Braunfels v. Waldschmidt, 109 Tex 302, 207 S.W. 303 cert. granted 306 U.S. 1(1938)
Cook v. State 467 S.W. 2d 421 (Tex. Crim. App. 1971)
Coyne v. State, 485 S.W. 2d 917 (Tex. Crim. App. 1972)
Curran v. Wallace, 306 US. 1, 83 L. Ed. 441, 59 S. Ct. 379 (1928)
Daggett v. State, 492 S.W. 2d 583 (Tex. Crim. App. 1953)
Eisenstadt v. Baured, 405 U.S. 438 (1971)
English v. Miller, 341 F. Supp. 714 (U.S.D.C. Va. 1972)
Furman v. Georgia, 408 US.. 238 (1972)
Griswold v. Connecticut 381 U.S. 479 (1965)
Haggerty v. State, 490 S.W. 2d 858 (Crim. App. 1973)
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)
Harris, v. U.S., 382 U.S. 162, 15 L. Ed. 2d 240 (1965)
Hieh v. U.S., 415 F. 2d 664, cert. denied 90 S. Ct. 941, 25 L. Ed 2d 117
Houston & T.C. Ry. Co. v. City of Dallas, 98 Tex. 396, 45 S.W. 648 (1905)
Johnson v. State 447 S.W. 2d 927 (Tex. Crim. App. 1970)
Louisiana Ex Rel Francis v. Resweber, 329 U.S. 459

Lovett vs. State 479 S.W. 2d 286
(Cr. App. 1972)
Mara v. State 487 S.W. 2d 93 (Tex.
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Marr v. State, 1972, 487 S.W. 2d 93
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Martinez v. State, 373 S.W. 2d 246 (Tex.
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McNeese v. State, 1971, 468 S.W. 2d 800
Medrano v. Allee, 347 F. Supp. 605
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Miller v. State 458 S.W. 2d 680 (Tex.
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Morse v. State 502 S.W. 2d 805 (Tex.
Crim. App. 1973)
NAACP v. Alabama, 359 U.S. 449 (1958)
Olmstead v. U.S., 277 U.S. 438 (1928)
People v. McCabe 49 Ill. App. 2d 338 (1971)
People v. Sinclair, 194 N.W. 2d 878 (1972)
Perez v. U.S., 402 U.S. 146 (1971)
Rena v. State, 434 S.W. 2d 362
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Rener v. Beto, 447 F. 2d 20 (5th
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Reyna v. State, 434 S.W. 2d 362
(Tex. Crim. App. 1968)
Robinson v. California, 370 U.S. 660, 667
Roe v. Wade, 410 U.S. 113 (1973)
Russo v. U.S., (5th Cir. 1972) 470 F.
2d 1357
Saldana v. State, 493 S.W. 2d 778 (1973)
Sanders v. State, 482 S.W. 2d 362 (Tex.
Crim. App. 1968)
Spann v. City of Dallas, 111 Tex. Cr. 350,
235 s.W. 513 (1921)
Stanley v. Georgia, 394 U.S. 557 (1969)
State v. Shopper's World, Inc.
(Tex. S. Ct.) 380 S.W. 2d 107

State v. Ward, 57 N. J. 75, 270 A. 2d 1 (1970)
Tibbetts v. State, 494 S.W. 2d 552 (Tex. Crim. App. 1973)
Townsend v. Burke, 334 U.S. 736, 92 L. Ed. 1690 (1948)
Trautschold v. State, 466 S.W. 2d 586 (Tex. App. 1971)
Tropp v. Dulles, 356 U.S. 86
Tuttle v. State, 420 S.W. 2d 780
U.S. v. Erlin, 283 F. Supp. 396 (U.S.D.C. Cal. 1968), af'd 413 F. 2d 1036 (1969)
U.S. v. Espinoza, 5th Cir. 481 F. 2d 553 (July, 1973)
U.S. v. Farber, 306 F. Supp. 48 (U.S.D.C. Cal. 1969)
U.S. v. Malcolm, 2d Cir. 1970, 432 F. 2d 809
U.S. v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592 (1972)
U.S. v. Weston, 1971, 448 F 2d 626
Weems v. United States, 217 U.S. 349, 378-382 & 372-373
Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337 (1949)
Yick Wo v. Hopkins, 118 U.S. 356

Texas Controlled Substances Act, Art. 4476-15, Sec. 101 (1973)

Tex. Code of Criminal Proc. Ann., Art. 42.12

House Bill Number 447 63rd Legis. Reg. Sess. (1973)

Federal

21 U.S.C. Sec. 801

21 U.S.C. Sec. 802 (16)

21 U.S.C. Sec. 802 (17)

21 U.S.C. Sec. 844 (a) (b) (2)

21 U.S.C. Sec. 903

SCHOLASTIC REFERENCES:

"Marijuana, A Signal of Misunderstanding," 1st Report of the National Committee on Marijuana and Drug Abuse

"Marijuana in Texas," Report to the Senate Interim Drug Study Committee (March 1972)

"Final Report," to the Senate Interim Drug Study Committee, January (1973)

Virginia Law Review, "The Forbidden Fruit of the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition," By Richard J. Bonnie and Charles A. Whitebeach II, 56 Va. L. Rev. 971, (1970)

CONSTITUTION, REGULATIONS, STATUTES, BILLS:

United States Constitution

First Amendment

Fifth Amendment

Eighth Amendment

Ninth Amendment

Fourteenth Amendment

U. S. House of Representatives Report 9-114

Texas

Tex. Penal Code Ann., Art. 725b

Tex. Penal Code Ann., Art. 725d

Tex. Penal Code Ann., Art. 726d

Tex. Penal Code Ann., Art. 1167

Tex. Penal Code Ann., Art. 1168

Tex. Penal Code Ann., Art. 1183

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Tex. Penal Code Ann., Art. 1256

Tex. Penal Code Ann., Art. 1257b

Tex. Penal Code Ann., Art. 1408

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PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

The petitioners, Charles Dewey Altsman and John J. Aguirre, by their attorney, Philip D. Hardberger, respectfully pray for a Writ of Certiorari to the Court of Criminal Appeals of Texas to reverse its decision affirming the judgment of the 175th

District Court, Bexar County, Texas.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is unreported but is appended hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on March 6, 1974. Petitioner's Motion for Permission to File Motion for Rehearing was denied by the Court of Criminal Appeals of Texas on March 27, 1974, at which time the judgment of said Court became final. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Does Article 725b of the Texas Penal Code (1961), on its face and as applied, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, insofar as same imposes felony penalties upon those adults for private possession of any amount of Marijuana?

II. Does Article 725b of the Texas Penal Code (1961), on its face and as applied, deprive Petitioners of their right to privacy and fundamental liberty guaranteed by the First, Ninth and Fourteenth Amendments, as those rights have been construed by the Supreme Court, insofar as such act imposes felony penalties upon adults for private possession of Marijuana?

III. Insofar as it pertains to Marijuana, is Article 725b of the Texas Penal Code (1961) and as reinacted in 1971, in such positive conflict with the Federal Comprehensive Drug Abuse Prevention and Control Act

of 1970, 21 U.S.C.A. Sections 801 et seq., that the two cannot stand together, thereby invalidating the Texas law?

IV. Does the Trial Court's conduct denying Petitioners' Application for Probation constitute a denial of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

V. Is Article 42.12 of the Code of Criminal Procedure of Texas (1965) so vague and indefinite as to deny due process and equal protection of law guaranteed by the Fifth, Ninth and Fourteenth Amendments of the United States Constitution?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I.

> "Congress shall make no law ... abridging the freedom of speech."

United States Constitution, Amendment V.

> "No person shall ... be deprived of life, liberty or property without due process of law..."

United States Constitution, Amendment VIII.

> "... nor cruel and unusual punishments inflicted."

United States Constitution, Amendment IX.

> "The enumeration ... of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment XIV.

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATUTORY PROVISIONS

Texas Penal Code (1961), as amended.

Article 725b (See Appendix)

The Code of Criminal Procedure of Texas (1965), as amended.

Article 42.12 (See Appendix)

STATEMENT OF THE CASE

On June 10, 1972, San Antonio Police Department Officers entered Petitioners' home in San Antonio, Texas, in execution of a search warrant (CA-TR 27) issued the previous day to Officer Hons which alleged Petitioners to be in possession of narcotic drugs, to-wit: Marijuana. Approximately seven pounds of Marijuana was found, for which Petitioners were arrested. Petitioners posted bail bond and were subsequently indicted (CA-TR 4: JA-TR 4) for possession of "a narcotic drug, to-wit: MARIJUANA". Petitioner's Motion to Suppress evidence based on illegality of the search warrant and search (CA-TR 8: JA-TR 9) was denied by the Court on December 12, 1972.

On December 21, 1972, Petitioners plead guilty to the charges (SF 24 et seq.) and duly filed their applications for probation (CA-TR 12: JA-TR 13). The

Trial Judge instructed Petitioners after taking their plea of guilty to go with their attorney to the Probation Office for an interview and at said office would make a report back to the Court "and when I have received that report then we'll have a hearing on your application for probation." (SF 30).

On January 12, 1973, a proceeding was had whereby the Trial Court Judge summarily denied Petitioners' Application for Probation (SF 30-31) and granted Petitioners 10 days in which to file their Motion for New Trial in lieu of sentencing. No evidence was presented at such time.

On January 22, 1973, Petitioners filed their sworn joint Defendants' Original Motion for New Trial (CA-TR 40: JA-TR 39) alleging, among other matters, that Petitioners had no prior criminal or juvenile records, were enrolled in a Junior College and were attempting to obtain a degree, that they were interviewed by a State psychologist and expressed their views frankly and honestly, that they had abstained from having any association whatsoever with drugs of any nature from the date of their arrest, and that confinement in the penitentiary was no longer used to rehabilitate on Marijuana cases, but solely to punish (CA-TR 37-38: JA-TR 36-37). Petitioners attached to the Motion a proposed Order setting a hearing on said Motion but which remains blank as to time, date, Court designation and signature of Judge presiding; the record being silent of action being taken, if any, by the Trial Court setting a date, place and time for such hearing.

FN-1 For purposes of this petition the transcript of Charles Dewey Altsman will be designated "CA-TR" and that of John J. Aguirre will be designated "JA-TR".

On February 2, 1973, a proceeding was held whereby Petitioners' Motion for New Trial was summarily overruled (SF 32) without granting the Petitioners the opportunity to present evidence nor to make a statement of any kind. The Trial Judge immediately advised Petitioners he was prepared to sentence each of them at that time and, for the first time, asked Petitioners if they had anything to say before he passed sentence upon them (SF 32). Petitioners accepted the opportunity to reply. The following discussion was had (SF 33);

"MR. SERNA: We have talked about this, Your Honor, and they have expressed certain feelings I think may be they should relate to the Court, but they weren't prepared to do so then (ie. at the time of overruling of Motion for a new trial). If the Court will indulge?

"THE COURT: Okay. You are Charles Dewey Altsman?

MR. ALTSMAN: Yes, sir. I have been found guilty of possession of marijuana and I understand that my request for probation was denied for the reasons when I told the probation officer-- I thought may be it needed some clarification. I think it was misunderstood or misinterpreted.

I did have a fairly large quantity of marihuana.

THE COURT: That is what was <u>persuasive to the Court</u>." (Emphasis added)

The Trial Court Judge again refers to the quantity of Marijuana involved in this case in response to Defense Counsel's statement re Court's holding these cases, replying that the "Court knows of no Court

holding up cases with the quantity that was involved in these particular cases." (SF 36).

On February 12, 1973, Petitioners filed their joint Motion to Reconsider Probation (CA-TR 52-53: JA-TR 50-51) requesting the Court's reconsideration alleging that all evidence as to the Petitioners in the community, their veracity to tell the truth and many other attributes were not made fully aware to the Court and that new and additional evidence was then available to the Court, which evidence, if allowed, would possibly result in a judgment contrary to the one under which the Petitioners then labored and that said Motion was made for the purpose that justice would best be served. The record reflects that no action was taken by the Trial Court on Petitioners' Motion to Reconsider Probation and that the Motion was never noted on the Trial Court's Criminal Docket Sheet (CA-TR 5-6: JA-TR 5-6).

The record is silent as to whether or not the probation officer's report (ie. pre-sentence report) was delivered to and/or considered by the Court.

Petitioners were sentenced on February 2, 1973, to serve no less than 2 nor more than 3 years in the Texas Department of Corrections. Petitioners gave in Court notice of appeal and the Court thereupon increased Petitioners' bond from $1,000.00 to $5,000 each (SF 35-37).

Reasons for Granting the Unit

I. Does Article 725b of the Texas Penal Code (1961), on its face and as applied, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, insofar as same imposes felony penalties upon those adults for private possession

of any amount of Marijuana?

The Texas "Marijuana" Law, Texas Penal Code Ann Art. 725b (1961), as amended, insofar as said Act applies to private possession of marijuana is unconstitutional as same constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Such violation of Petitioners' right to be protected from the infliction of cruel and unusla punishment by the State is clear and evident when viewed in light of the wording of the statute proscribing possession, the application of penalities by the State for violation of such proscription and the effect of such law upon Petitioners and society and the ends or results actually accomplished by the application of the law, the latter of which necessarily reflects materially as to whether or not the proscription accomplishes the desired results of the legislature. It is now well settled that the Fourteenth Amendment's requirement of due process proscribes the infliction by the State of cruel and unusual punishment. Louisiana Ex Rel. FRANCIS vs. RESWEBER, 329 U. S. 459, 463, and 473-474 (Burton, J., Descenting); ROBINSON vs. CALIFORNIA, 370 U. S. 660,667. It also is settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature. WEEMS vs. UNITED STATES, 217 U.S. 349, 378-382.

A. Severity:

At the time of Petitioners' convictions only three offenses in Texas carried a maximum penalty that equaled or exceeded the penalty for simple, first-offense possession of Marijuana, to-wit: Murder with malice (Tex. Penal Code Ann. Art. 1256 (1927), Rape (Tex. Penal Code Ann. Art. 1183 (1918) and Robbery by firearms (Tex. Penal Code Ann., Art. 1408 (1895).

This Court's decision in FURMAN vs. GEORGIA, 408 U. S. 238 (1972), banning the death penalty effectively equalized possession of Marijuana as one of the four most serious offenses in Texas. Art. 725b (1961), entitled "Narcotic Drug Regulations," provides the penalty for first offense possession of Marijuana to be "not less than two years nor more than life" confinement in the State Penitentiary at Sec. 23 (1). The severity of such penalty for a so-called "victimless" crime is further intensified by comparison to the maximum penalties prescribed for the following crimes: Castration- 15 years (Tex. Penal Code Ann. Art. 1168 (1925), administering poison- 5 years (Tex. Penal Code Ann. Art. 1191 (1858), disfiguring - 5 years (Tex. Penal Code Ann. Art. 1167) and murder without malice- 5 years (Tex. Penal Code Ann. Art 1257b (1927). Art. 725b Sec. 2(a) proscribing "possession" of "any narcotic drug" does not distinguish between small amounts and large amounts of the drug and, the Court of Criminal Appeals of Texas has held that 63 milligrams of Marijuana was sufficient to support a conviction for possession of Marijuana. TUTTLE vs. STATE, 420 SW2d 780, (Tex. Crim. App. 1966). Conceivably, an adult individual who has never been involved in criminal activity and who is found in possession of 22/10,000 (ie. 63 milligrams) of Marijuana within the confines of his private residence could be sentenced upon conviction to life imprisonment, whereas a similar individual who may kill another person with his automobile while driving said automobile under the influence of alcohol, a legal drug, would face the maximum penalty of 5 years imprisonment for murder without malice upon conviction.

In 1971, the Texas Senate established, by Senate Resolution No. 1442, the Senate Interim Drug Study Committee, 62d Texas Legislature Reg. Sess., demanding the Committee to re-examine the Texas Drug

Laws. This Committee, chaired by Senator Don Kennard produced the most comprehensive report about Marijuana in Texas to date; the first Report is entitled "Marijuana in Texas," A Report to The Senate Interim Drug Study Committee, March, 1972, and followed up its first report with the Committee's recommendations and conclusions entitled "Final Report," Senate Interim Drug Study Committee, January, 1973. The Committee's findings, conclusions and recommendations are particularly relevant to the issues at hand.

The severity of punishment under Texas law extends beyond the length of the sentence imposed. Once an individual has been branded "felon," upon conviction, he necessarily suffers and will continue to suffer throughout his life by reason of the stigma attached to such convictions of a serious nature. The Senate Interim Drug Study Committee's First Report recognized the severity of the felony conviction in Texas, at p. 24.

> "The consequences of a felony conviction are drastic indeed. Even if the offender is put on probation and is never sent to the penitentiary, his permanent police record will show that he was convicted as a felon. He will lose the right to vote, the right to serve on juries, and the right to hold many public offices. He cannot pursue a career as an attorney, and many other fields of employment are effectively closed to him."

There is no provision in Texas law allowing for the "expungement" of a convicted felon's record. Article 42.12, Adult Probation and Parole Law, Code of Criminal Procedure of Texas, at Sec. 7 (see Appendix) grants discretionary authority to the trial Court Judge, upon proper petition of the Defendant who has been

placed on probation, to release the Defendant from all penalties and disabilities resulting from the offense after a specified period of time; however, a Defendant sentenced to a term in excess of ten years is not entitled to this treatment under the law for the sole reason that probation shall not be granted, nor application made therefor, for defendants sentenced beyond the ten year term for any offense, Sec. 3.

Texans in general may very well not be aware of the manner of which Marijuana possession penalties are applied in Texas; Senator Kennard's Committee made a special effort to obtain the available facts as to arrest, convictions and sentences. The Committee found that Texas does not have an adequate State-wide system for reporting criminal statistics and by virtue thereof were necessarily relegated to rely to a great extent upon the accurate figures supplied by the Texas Department of Public Safety, the Police Departments of Houston, Dallas, Fort Worth and Austin, Lubbock County and Tarrant County, as well as the requested 1972 report from the Texas Department of Corrections relating to drug offenders with emphasis on violators of the Marijuana laws. First Report, supra, pp. 34-43. A summary of relevant statistics as of January 24, 1972, reported by the Texas Department of Corrections reveals the cold, hard facts of incarceration in Texas for Marijuana possession from which one may draw his own conclusions, to-wit:

Total drug offenders incarcerated:	1,894
for possession of marijuana	691
for sale of Marijuana	79
for sale/possession of Marijuana	30
Total Marijuana prisoners	800

(First Report, supra, p. 42)

Average sentence -
Marijuana possession 9.64 years
Average sentence -
Marijuana sale 9.76 years
(First Report, Supra, p. 49)

Thirty (30) prisoners are serving in excess of thirty years for possession of Marijuana.

Thirteen (13) prisoners are serving life sentences for possession of Marijuana: all are male, eight (8) are Chicano (ie. Mexican-American), two (2) are black, three (3) are white.

Ten (10) prisoners are serving life sentences for possession of Marijuana alone,

> Three (3) are first offenders, one of whom was convicted for one penny match box full of Marijuana. (Emphasis Added)

Six (6) possession of Marijuana prisoners, serving thirty or more years are first offenders, three of whom are serving life sentences.

275 of the 691 prisoners incarcerated for possession of Marijuana are first offenders.

55.76 percent of all persons imprisoned for Marijuana offenses are first offenders.. (First Report, Supra, p. 49)

Senator Kennard's Committee concluded that the penalties in Texas for Marijuana possession are more severe than those of any country in the world (First Report Supra, p. 34) and attempted to explain the basis for such unique, unusual and harsh penalties in their First Report, to-wit:

"The reason for this extraordinary situation is historical rather than logical. The Texas Uniform Narcotics Act, which inaccurately classifies Marijuana as a narcotic drug, was enacted in 1937, at a time when Marijuana was a strange and unfamiliar substance. The popularly accepted "facts" about Marijuana were that it was physically addictive, caused insanity, and generated crime and violence. Since 1965, however, the use of Marijuana has increased many fold, particularly among white, middle-class persons; and the experience during this period has tended to refute the "facts" upon which the original criminalization was based. The overwhelming majority of states have recognized this situation and have begun to ammend their laws accordingly; Texas has not. (p. 34) (Emphasis added)

Unfortunately, statistics relating to arrest, indictments, convictions, acquittals, and probation are not adequately available in Texas. Howeever, the Committee was sufficiently able to utilize existing information to conclude "substantial felony sentences are still being imposed for Marijuana offenses in Texas." (First Report, Supra at p. 41)

B. Arbitrary infliction of severe penalties and discrimination:

The Texas Marijuana Law and the enforcement of same constitutes a massive abuse of legislative and judicial authority undermining the basic principles established by our Bill of Rights. The erroneous classification of Marijuana as a "narcotic," the overly broad discretionary power granted judges and juries sentencing Marijuana convicts and thereby granting "Carte Blanche" authority to draw upon whim, prejudice or mere ignorance, the unequal enforcement of the

law, and the fact that the object of the law is not accomplished by either the proscription of the substance or enforcement of such proscription, indeed creates an "unusual" punishment, whether considered singly or in combination; considered together and in relation to each other, these factors personify grossly arbitrary infliction of the severe penalties for private possession of Marijuana in Texas. The "fundamental" rights of all persons, such as privacy, liberty, freedom, equal treatment under the law, fair treatment under the law, and the right "to be let alone," are in serious jeopardy through the continued enforcement of such an arbitrary and unreasonable law. It has been said, and logically so, that to cure or solve a problem one must determine the source or cause of the problem. In Texas the source of arbitrary inflictment of severe penalties for private possession of Marijuana lies in the classification of the substance as a narcotic drug along with Morphine, Codein, and Heroin, Article 725b, Sec. 1 (12) (13), (14), despite the commonly accepted fact that Marijuana is <u>not</u> a narcotic drug. It is a matter of "common knowledge" that Marijuana is not a narcotic drug and was legislatively and judicially so determined prior to Petitioners' convictions in the case at bar. Upon reenactment of Article 725b in 1971 by the 62nd Legislature of Texas, the Texas Legislature inexcusably disregarded the U. S. Congress' reclassification of Marijuana as a non-narcotic as set out in SEc. 801 et seq. of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, and further disregarded the Federal Act's provision for misdemeanor penalty for possession of Marijuana; Texas retained its 1939 classification of Marijuana as a narcotic drug and the two years to life imprisonment penalty for possession of any amount of same. Of utmost importance is the wealth of information made available to the public through the Federal Government's Report of the National Commission on Marijuana and Drug Abuse,

"Marijuana: A Signal of Misunderstanding" (March, 1972) and the Texas Government's Reports of the Senate Interim Drug Study Committe, "Marijuana in Texas" (March, 1972), herein referred to as the "First Report," and the "Final Report" (January, 1973), each of such reports having reiterated the fact that Marijuana is not a narcotic drug and that felony penalties for possession of same are "unjustified" and further that no criminal penalties whatsoever should be applied to the possession of Marijuana for use by adults in the privacy of their own homes. Yet the Texas Legislature failed and refused to heed such overwhelming credible weight of authoritative information. Such legislative contempt for reality, turning as it does upon social and political passions and prejudices is a glaring example of arbitrary and capricious abuse of the police power. The substantive due process concept of constitutional law is expressly formulated to prevent and correct such obviously ill-conceived and patently false twisting a fact.

The incredibly wide range of sentences allowed by Art. 725b and the "absolute" discretionary authority granted to the trial judge or jury by Art. 42.12 regarding probation provides a more than adequate forum for the interjection of prejudice, bias, discrimination and lack of informed judgment in the sentencing process. The Court of Criminal Appeals of Texas has consistently held that sentences within the limits authorized by law are not so excessive, cruel and unusual as to violate constitutional protections, LOVETT vs. STATE, 479 S.W.2d 286 (Cr. App. 1972), that such matters are for the judge or jury and legislature and not the Courts, HAGGERTY vs. STATE, 490 SW 2d 858, (Cr. App. 1973) and that the judges discretion to grant or deny probation under the probation act is, in effect, absolute, TRAUTSCHOLD vs. STATE, 466 SW 2d 586 (Cr. App. 1971). Therefore, keeping in mind that there

are no general or specific guidelines to determine eligibility for probation (see Art. 42.12, Sec. 3), it is reasonably conceivable that arbitrary and discriminatory sentences are likely to occur such as was the case in FURMAN vs. GEORGIA, supra. Discrimination as to sex, race, economic position and geographic location is not only conceivable in Texas but in fact is the case according to the findings in the "First Report" of Senator Kennard's Committee, "Marijuana in Texas" which utilized statistics and other relevant information from the Texas Department of Corrections report to the Committee, to-wit:

> (1) Females are much less likely to receive prison sentences for Marijuana offenses than males. Females account for 10% of the Marijuana arrests but account for only 4% of the total Marijuana prisoners in the Texas Department of Corrections. (p. 43)
>
> (2) The likelihood of a prison sentence is heavily influenced by race of the accused. Blacks account for 37.5% of imprisoned Marijuana offenders and only 12% of the State's population; Chicanos (ie. Mexican-Americans account for 19% of the inmates and approximately 15% of the State's population; whites represent 43.5% of the inmates and almost 73% of the State's population. (p. 44)
>
> (3) Although usage of the drug is popularly considered to be the greatest among middle-class, college-educated persons, it is the poorly educated, noncollegiate Texan who stands by far the greatest chance to be sent to prison. Less than 5% of all Marijuana inmates have an educational achievement of 12th grade or above; a majority have less than 8th grade

achievement. (p. 44)

(4) Among the most startling of all the Marijuana statistics, however, are those which show the County of the offenders residence. Generally speaking, a Marijuana user in North Texas stands a much greater chance of going to prison than one in South Texas. In the fourteen Rio Grande Counties bordering Mexico from El Paso to Brownsville, which have combined population of more than 800,000, only 10 persons are imprisoned for Marijuana offenses. By contrast 12 persons are imprisoned from Potter County (Amarillo), with a population of 90,000. (Note: These statistics are astonishing considering the obviously large volume of Marijuana being imported through the Mexican border Counties.) (p. 45-46)

(5) There is dramatic variation in treatment of Marijuana offenders in the 10 largest Texas Counties. Harris contains 15.6% of the total population of Texas, but accounts for 26.5% of the Marijuana prisoners. Dallas County contains 11.9% of the total State population, yet accounts for 29.3% of the total Marijuana prisoners. This discrepancy is attributable to differences in the countys' criminal justice systems rather than to higher usages indicated by the fact that other major urban centers such as Bexar County and Tarrant County, sent less than their proportional number of citizens to prison on Marijuana charges. There is no evidence to suggest that Marijuana use is 3 times higher in Dallas than in Fort Worth, but a Dallas Marijuana user stands a far greater chance in being sent to prison than a user in Fort Worth. (p. 47)

The difference in treatment of Marijuana offenders

between the fifth largest county (El Paso - a border county) and the sixth largest (Travis - central Texas county) is also worth noting. 32 inmates are from Travis, and only two from El Paso. The fact that Travis County contains the 40,000 student-Austin campus of the University of Texas is not alone sufficient to explain this huge variation; El Paso County has 60,000 more residents than Travis, adjoins the Mexican border and is the site of the 11,000-student campus of the University of Texas of El Paso. Here as elsewhere, the primary difference appears to be in enforcement, not in usage. (p. 47)

(6) Blacks and Chicanos (ie. Mexican-Americans) receive longer sentences. Of the ten Marijuana offenders serving 31 to 40 years - 5 are Black, 4 are Chicano, and one is White. Of the 7 Marijuana offenders serving more than 50 years - 5 are Black, and 2 are White. Of the 13 persons serving life sentences - 8 are Chicano, 2 are Black, and 3 are White. (p. 49)

(7) 30.63% of all Marijuana prisoners are under the age of 22 years. (p. 50)

Unfortunately, Senator Kenard's Committee was unable to report adequate statistics on arrests, convictions and probations to give us a clear picture of the treatment accorded the thousands that are not incarcerated in the Texas Department of Corrections. However, the prisoner statistics and the conclusions of Senator Kenard's Committee allows one to conclude in a less than speculative manner that fair and equal treatment is in all probability not accorded those arrested and tried who are of different sex, race, and educational levels, the latter of which may very well be indicative

of the distinction between rich and poor.

Further arbitrary law enforcement action involving Marijuana offenders may be found in the "forfeiture' provisions ((PC Art. 725d) in the Texas Penal Code which permits the Department of Public Safety to sell forfeited vehicles or to retain them for official use should contraband be found in said vehicles. The Committee, upon requesting statistics from the Department of Public Safety of Texas, received the results and reported in the Committee's "Final Report," Supra, p. 27, that the results of such inquiry represented the "single most shocking statistic which has come to the attention of this Committee," to-wit:

> In the eight month period from October, 1971, to June 1972, 84 vehicles were seized under the authority of the State of Texas, an average of one every three days. 36 of these have been disposed of by sale at public auction or by conversion to police use. The illegal substance found in every vehicle (except one, listed as unknown) was Marijuana. None of the forfeitures involved Heroin, Cocaine, Methamphetamine or any other hard drug. In not a single instance has a forfeiture law been used against hard drug possession or traffic.
>
> Even more astonishingly, in not a single instance has it ever been used against the Marijuana traffic. Despite the fact that commercial Marijuana traffic passing through Texas is measurable in the hundreds of tons annually, only two seizures were recorded for amounts in excess of one ounce (and these were for 5 ounces and one pound). The remainder involved the equivalent of no more than 10 cigarettes, and some involved less than 1 cigarette.

It is interesting to note the terminology used to describe the Committee's feelings about the forfeiture of vehicles: "... that vehicle forfeiture is a barbarically excessive penalty for the crime of drug possession." (Final Report, Supra, p. 28) An old adage in Texas is to the effect that "a man can get himself hung for horse thievin', but go scott free for murder." It may still be true that in some circles property remains at a premium whereas life and liberty do not.

Many tragic consequences occur through the enforcement of the Texas Marijuana Law, some of which have been noted above. The Texas possession of Marijuana defendant is charged for violation of a law he cannot rationally comprehend and, by virtue of its irrelationality, he soon disrespects the law and those who enforce it; he is thereafter advised of an incomprehensible penalty for the offense; upon conferring with his attorney relating to the facts of the case and his "clean" background, he learns that additional monies will be required to try his case but that if he were to plead guilty he would in all likelihood receive a minimum probated sentence because of his good character, excellent reputation and fair academic standing; he has an almost sure "chance" to receive probation from the judge, but, of course there are no guarantees; emerging from the traumatic confrontation with his family, who have advised him to take his punishment, broke, and believing he surely can have his civil rights restored upon completion of probation, he enters his plea of guilty and applies for probation and follows the judge's instructions to report to the probation officer for a pre-sentence report, and thereafter "honestly" confers with the probation officer; he appears in Court for his probation "hearing," whereupon he is advised that his application for probation has been considered and, without explanation, denied. He is to make additional bond if he wishes to appeal, otherwise, he shall be incar-

cerated in the Texas Department of Corrections for a period of no less than 2 nor more than 3 years. The record in the case at bar reveals a similar procedure followed by the Trial Court with one basic exception, to-wit: Subsequent to Petitioners' application for probation being summarily denied by the Trial Court (SF 30-31), Petitioners filed their joint Original Motion For New Trial and thereafter returned for a hearing on same (SF 32), whereupon the Court advised Petitioners it had "studied" the Motion and same was overruled. For the first time subsequent to Petitioners' plea of guilty the Court granted Petitioners an opportunity to make a statement to the Court prior to the Court's passing sentence. The following discussion was had (SF 33):

"MR. SERNA: May we approach the bench, Your Honor?

THE COURT: All right.

MR. SERNA: We have talked about this, Your Honor and they have expressed certain feelings I think maybe they should relate to the Court, but they weren't prepared to do so then. If the Court will indulge?

THE COURT: Okay. You are Charles Dewey Altsman?

MR. ALTSMAN: Yes, sir. I have been found guilty of possession of marihuana and I understand that my request for probation was denied for the reasons when I told the probation officer-- I thought maybe it needed some clarification. I think it was misunderstood or misinterpreted.

I did have a fairly large quantity of mari-

huana.

THE COURT: That is what was persuasive to the Court."

The Trial Court judge clearly and unequivocally based his decision to deny Petitioners' application for probation upon the "quantity" of Marijuana involved in the case at bar. The Trial Court's action in this regard as denying Petitioners due process and equal protection are treated separately in this Petition. A careful review of the record in this cause reveals the Trial Court did not at any stage allow Petitioners to present evidence in their behalf until immediately prior to sentencing and subsequent to the Trial Court's summary overruling of Petitioners' Motion For New Trial, even though said Motion contained sworn statements by both defendants that this offense was their first offense, that there are no set or definite standards by which the probation officers judge a candidate for probation, nor by which the Courts make their rulings, that defendants complained of an arbitrary interview with the State Probation Officer assigned to them as well as an arbitrary examination by a Court appointed State psychologist whose conclusions were not well founded, that Petitioners were enrolled in a Junior College and were attempting to obtain a degree at the time of their arrest, that there was no harm done to society but only to themselves, if anyone, by possessing the drug, that they have abstained from having any association whatsoever with this or any other drugs from the date of their arrest, that the sentence of the Court was for punishment only and not to rehabilitate and that the State Legislature was currently considering a reduced penalty for the offense of possession of Marijuana and a new trial should therefore be granted and defendants case held in abeyance. Such arbitrary and unreasoned conduct of the trial judge flagrantly violates the most fundamental

tenets of fairness protected by the vital and necessary principles of the due process clause of the Fourteenth Amendment and those embodied in the equal protection clause of said Amendment. Subsequent to sentencing, Petitioners again petitioned the Court on February 12, 1974, to reconsider their application for probation (CA-TR 52-53; JA-TR 50-51) alleging that all evidence as to Petitioners in the community, their veracity to tell the truth and many other attributes were not made fully aware to the Court and that new and additional evidence was then available to the Court, which evidence if allowed, would possibly result in a judgment contrary to the one under which the defendants then labored; defendants were again denied the opportunity to present evidence bearing on said issues raised insofar as the record as a whole reflects no action was taken by the Trial Court on defendants Motion To Reconsider Probation. Although properly filed, the Motion was never in fact noted on the Trial Court's Criminal Docket Sheet (CA-TR 5 & 6; JA-TR 5 & 6).

The Trial Court's intent and reasoning becomes clear when taking into consideration the State of Texas does not have a penal statute proscribing "possession of Marijuana with intent to sell." Although Petitioners were indicted for simple possession of Marijuana and there were no allegations of "selling" or "intent to sell," the Trial Court sought to more severely punish Petitioners upon the assumption Petitioners were in some way involved in selling the drug. The Trial Court accomplished its purpose, and, in this respect, Petitioners contend they have been convicted and sentenced to prison for an offense unknown to Texas Law. Petitioners have been denied equal protection of the laws.

C. Failure to accomplish deterrent effect - unnecessary statute:

The serious offense and harsh punishments involved in possession of Marijuana are not accomplishing what the law was intended to accomplish, to-wit: To deter people from using Marijuana. Senator Kennard's First Report, "Marijuana in Texas," supra, addressed the effectiveness of the said law at p. 51 under the heading "Do the harshest drug laws work?" The Committee concluded that the said laws are not causing reduced drug usage and "usage of Marijuana in Texas appears to be little different than it is in the rest of the Country - indeed it may even be higher in Texas than in other states which have lower penalties;" the severity of the sentence cannot be considered to either further reduce usage in states with higher penalties nor increase usage in states with lower penalties and "the possibility of a life sentence has clearly not prevented drug usage here from growing apace with the rest of the country" (p. 52). The question as to Texas' location to Mexico, a major supplier of illegal Marijuana to the United States, the Committee quoted a report from the Federal Bureau of Narcotics and Dangerous Drugs to the effect that "the felony possession penalties in the present Texas Drug laws have not had an appreciable effect on reducing the flow of illegal drugs across the Mexican Border" (p. 52). Obviously referring to drug laws in Texas as they relate to the importation and trafficking of Marijuana for the protection of other states, the Committee further concluded "there is, in addition, dubious logic in the assertion that Texas should continue to direct felony possession penalties against its own citizens in order to "protect" the 48 interior states which have misdemeanor penalties themselves." There appears to be no significant justifiable use for the felony penalties in the opinion of Senator Kennard's Committee insofar as the Committee has found and which is now a matter

of common knowledge, along with the National Commission on Marijuana, infra, that Marijuana usage is rapidly on the increase throughout the country, inclusive of Texas, such conclusion constituting in part the reason for both the National Commission and the Senate Committee to recommend the Federal and State Legislatures remove all criminal penalties for possession of Marijuana for private use by adults.

D. Penalties unacceptable:

Texas, at the time of defendants convictions, had the dubious distinction of being the only state in which first offence possession of Marijuana is always treated as a felony as well as a penalty range of a minimum of 2 years to a maximum of life imprisonment. The failure of the Texas Legislature to enact a law criminalizing "possession with intent to sell" Marijuana cannot rationally be utilized to justify in any respect the felony penalty imposed by Article 725b nor to justify a Trial Judge or jury to deny probation to an applicant solely or predominantly on the basis of quantity possessed. The weight of scientific, medical and legal authority finds criminal penalties in any form unacceptable. Senator Kennard's Committee in its "Final Report," supra, p. 26, listed a number of groups and individuals which have endorsed descriminalization of private possession of Marijuana for personal use, to-wit: The National Commission on Marijuana and Drug Abuse, the Board of Trustees of the American Medical Association, the American Public Health Association, the Committees on Drug Abuse and Alcoholism and Drug Reform of the American Bar Association, the American Civil Liberties Union, the National Commission on Crime and Delinquency, the Canadian Commission of Inquiry Into the Non-Medical Use of Drugs, Dr. Bertrom S. Brown (Director of the National Institute of Mental Health in the Department of Health, Education, and Welfare), and

Dr. John Finlator (retired Assistant Director of the U. S. Bureau of Narcotics and Dangerous Drugs). Others have publicly taken such a position.

Petitioners do not claim the state or federal legislatures are without power to regulate the use of Marijuana and are not alleging the Texas Legislature did not have such a compelling state interest in 1939 to enact Art. 725b criminalizing private possession of the drug. Petitioners rely upon the Eighth Amendment's requirement that legislatures "write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups "as expressed by Justice Douglas in FURMAN v. GEORGIA, 408 U.S. 238, 256, and, upon the legislature's enactment of a penal law which is so overly broad as to lend the enforcement thereof to unequal application, that upon such arbitrary enforcement it therefore becomes the Court's duty to protect citizens from arbitrary, discriminatory and unequal enforcement by reason of the Fourteenth Amendment's Equal Protection Clause. YICK WO v. HOPKINS, 118 U.S. 356. This Court is authorized to protect Petitioners from legislative and judicial "abuse of power" and to take into consideration current conditions and knowledge to rationally determine the issue, BROWN v. BOARD OF EDUCATION, 347 US. 483, 492; WEEMS v. UNITED STATES, 217 U.S. 349, 372, 373.

The mental pain and anguish suffered by Petitioners by reason of being charged with an unreasonable, unjustified and arbitrarily enforced penal law is hard to measure, but is undoubtedly severe; to further subject Petitioners to the status of "felon" and totally strip them of their freedom is "barbaric" and, in the least, violates the principles of "Civilized treatment" guaranteed by the Clause as expressed in TROP v. DULLES,

356 U.S. 86.

In view of (1) the credible authority of opinion in the professional fields (ie. medical, legal, scientific) calling for removal of criminal penalties for possession of the drug (2) the conclusions and recommendations of duly constituted governmental committees demanding decriminalization, (3) the unequal and discriminatory manner in which the Texas law is enforced against blacks, the poorly-educated, males and those who reside in the "wrong" county, (4) the fundamental rights restricted by criminalization, to-wit: privacy, liberty and freedom, (5) the arbitrary manner in which Petitioners were sentenced and probation denied (6) and the inability of the statute to accomplish a deterrent to Marijuana use, Petitioners believe such punishment violates the Eighth Amendment according to FURMAN v. GEORGIA, supra, and the principles or "tests" set out therein by Justice Brennan, at page 282, in that (a) Texas felony penalties and imprisonment for a minimum of two years is "unusually severe" for mere possession of Marijuana, (b) there is a "strong probability" the Texas Marijuana laws are "inflicted arbitrarily." (c) contemporary society has "substantially rejected" such penalties and (d) there is no reason to believe the Texas law serves any penal purpose whatever, much less a purpose that could be more effectively accomplished "by a less severe punishment."

II. Does Article 725b of the Texas Penal Code (1961), on its face and as applied, deprive Petitioners of their right to privacy and fundamental liberty guaranteed by the First, Ninth and Fourteenth Amendments, as those rights have been construed by the Supreme Court, insofar as such Act imposes felony penalties upon adults for the private possession of Marijuana?

For the reasons stated above in the preceeding section, and for the additional reason that the Texas statute prescribing private possession of Marijuana for personal use is an ineffective deterrent to distribution and "trafficking" in the drug, clearly shows the State does not have such a "compelling state interest" to justify invasion and destruction of their right to the privacy of their home, their freedom of self expression, and to be let alone, insofar as the protection of such rights has been guaranteed and expressed in ROE v. WADE, 410 US 113 (1973), STANLEY v. GEORGIA, 394 US 557 (1969). Senator Kennard's report, "Marijuana in Texas," reveals the Texas Marijuana law is not enforced against the drug "dealer;" the record in the case at bar strongly suggests a more severe punishment to have been imposed because of the "quantity" of Marijuana involved indicating enhancement of punishment based on pure speculation that Petitioners were in some way associated with selling the drug. Petitioners were indicted for possession of a "narcotic drug, to-wit: Marijuana;" at the very minimum, due process requires a valid charge, fair treatment by the Court and exclusion of punishment based on speculation of commission of offenses for which Petitioners were not charged, and especially for commission of an act not an offense under Texas law (i.e. possession with intent to sell).

III. Insofar as it pertains to Marijuana, is Article 725b of the Texas Penal Code (1961) and as reenacted in 1971, in such positive conflict with the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. Sections 801 et seq., that the two cannot stand together, thereby invalidating the Texas law?

In recent years, a development has occurred which is relatively new in the American system of

criminal jurisprudence -- the general Federal criminal statute. Those statutes penalize types of criminal conduct which had heretofore been purely intrastate in character. Prior to this type of Federal enactment, it had been necessary to prove, as an element of each Federal prosecution, a specific Federal connection -- that the victim was a Federal officer, was Federally insured or that a state line had been crossed, to give but three examples. PEREZ v. UNITED STATES, 402 U.S. 146, 28 L.Ed.2d 686, 91 S.Ct. 1357 (1971), is the leading case.

Prior to the Perez decision, lower Federal Courts had upheld Federal statutes criminalizing purely intrastate transactions in narcotics and dangerous drugs. See U.S. v. ERLIN, 283 F.Supp. 396 (U.S.D.C. Cal. 1969).

In enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. & 801 et seq., Congress explicitly extended the legislation to intrastate transactions:

"Section 801. Congress makes the following findings and declarations: . . . .

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because --

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling interstate traffic in such substances . . .

(5) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic. (Emphasis added)."

Not desiring to supersede State laws and enforcement procedures which were in harmony with the Federal law, it was provided:

&903. Application of State law:

"No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." (Emphasis added).

The relevant inquiry, then, is whether Article 725b of the Texas Criminal Code, re-enacted by the

legislature in 1971, so positively conflicts with the Federal law that the two "cannot consistently stand together." If so, at least to the extent of the conflict, it is void.

A. Definitions.

The Federal definition of "narcotic drug" found in Section 802 excludes marihuana. This is deliberate, reflecting, no doubt, the finding of House Report 91-114:

"FABLE	FACT
1. Marihuana is a narcotic	1. Marihuana is not a narcotic except by statute. Narcotics are opium or its derivations (like some synthetic chemicals with opium-like activity)."

Substituting fable for fact, the Texas statute classified "marijuana" as "cannabis" and "cannabis" as "narcotic drugs," Art. 725b, Sec. 1(13)(14)(15).

Federal law instead defines marihuana as a "hallucinogenic substance," Sec. 8 12(b) Schedule I(c). As if to preclude any possibility of reconciliation between Texas and Federal law, the Legislature, in amending Article 726d in 1971, includes "hallucinogens" in that Article, thereby defining them only as a dangerous drug" -- not as a "narcotic," Sec. 2(a)(3)(4).

To compound the vagueness and inconsistency, the Legislature amended the definition of "narcotic drugs" in 1971 to include "substances which are now listed in, or may be added subsequently to, Schedule II, Title II, Part B, Section 202" of the Federal statute, Art. 725b. Schedule II states, in three separate instances, "Unless specifically excepted or unless listed in another schedule, any of the following . . ." Needless to say, marihuana is listed in another schedule.

In so doing, the Legislature included within the definition of "narcotic drugs" a schedule from which Congress had previously expressly excluded marihuana. The exact legal effect of this exclusion upon the Texas narcotic law counsel for Petitioners is unwilling to conjecture.

Central to this analysis is that the State Legislature, subsequent to and at variance with the will of Congress, enacted drug definitions which frustrate the purpose of a comprehensive and controlling Federal law. Congress intended a broad and beneficial national drug law which would accurately classify drugs according to their medical characteristics and their potential for abuse. It sought to establish uniform and binding Federal policies which would deal with a national problem on a national scale. The United States recognizes that the problems associated with marihuana usage are totally dissimilar from the frightening dilemmas arising out of the heroin epidemic. Texas does not. Congress does not irrationally equate marihuana users with narcotic addicts. The Legislature does.

This Court has recognized that uniform definitions and standards are the very heart of any beneficial regulatory plan which Congress enacts under the

Commerce Clause. CURRAN v. WALLACE, 306 U.S. 1, 83 L.Ed. 441, 59 St.Ct. 379 (1928).

In this instance, the Texas Legislature has sought to avoid controlling Federal policy by giving "marihuana" the totally false label of "narcotic." Worse, the Legislature has rummaged around in the Federal definitions, arbitrarily incorporating a fragment into Article 725b and equally arbitrarily rejecting the rest. It would be as sensible to negate the Federal Poultry Products Inspection Act by simply giving "ducks" an intrastate definition of "pork."

B. Punishment.

The Federal Act provides that the punishment for first offense simple possession of marihuana shall be by "a term of imprisonment of not more than one year, a fine of not more than $5,000, or both" 21 U.S.C.A. § 844(a). On the other hand, the Texas Act provides that the punishment for first offense simple possession of marihuana shall be by "imprisonment in the penitentiary for not less than two years no more than life." TEX. PENAL CODE ANN., art. 725b, §23a (1961).

In enacting the Comprehensive Drug Abuse Prevention and Control Act, with a misdemeanor provision for possession of marihuana, Congress reversed its previous policy. The original Federal statute pertaining to the possession of marihuana, The Marijuana Tax Act of 1937, 26 U.S.C.A. §4742 et seq. (1937), provided for a sentence of two to five years for the first offense. In 1951 and 1956, the statute was amended to ultimately provide a mandatory minimum term of three years with no probation. A very tough statute!

The 1970 legislation recognized that felony penalties for first offense possession of marihuana were

both unwarranted and counter-productive. Thus, the diametric change of Federal policy from harshness to lenience.

Assuming that the Appellants have a life expectancy of 50 years, the maximum State penalty is 50 times as great as the maximum Federal penalty. It is impossible to calculate the relationship between the Texas minimum sentence of two years imprisonment with the minimum Federal sentence, since Federal law does not require -- in fact, discourages -- any incarceration whatever.

At one time, it was thought that extremely harsh prison sentences would cause a decrease in marihuana usage. Quite the contrary. During the time when the Federal statute requiring a mandatory three-year term was in effect, marihuana usage spread from certain minority groups and a few musicians to about 11% of the entire population. Notwithstanding Federal abandonment of felony sentences, however, Texas, alone among the states, continued the policy.

C. Expungement of Criminal Record

In the case of a person who was not over twenty-one years of age at the time of the offense of simple possession of marihuana, who was convicted of the offense, who was granted probation and who satisfied the conditions of such probation, the Federal Act provides that the person is entitled, on application to the court, to have "all recordation relating to his arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge" expunged from public record (21 U.S.C.A. §844 (b) (2). The Texas Act, on the contrary, makes no such provision. Such a provision for expungement is unknown to Texas law.

D. Preservation of Civil Rights

The Federal Act provides that, following the expunction described above, the person as to whom such order of expunction has been entered shall not be held thereafter guilty of perjury or giving a false statement by reason of his failures to recite or acknowledge such arrest, indictment or information, or trial in response to any inquiry made of him for any purposes (21 U.S. C.A. &844 (b) (2). The Texas Act makes no such provision. A conviction under Federal law leaves intact the right to vote, but a felony conviction under State law precludes voting in both State and Federal elections.

IV. Does the Trial Court's conduct denying Petitioners' Application for Probation constitute a denial of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

Pettioners found themselves in unique and unusual circumstances as compared to the greater majority of first offense Marijuana offenders, to-wit: In addition to the termination of valuable civil rights through felony conviction, the most treasured of privileges, that of personal liberty and freedom, was ordered taken from them through the Trail Court's denial of their application for probation, although the granting of same would not have been without limitation and restriction. Leniency for these Appellants was denied where it had been granted to so many others similarly situated and to those involved in much more serious and heinous crimes, such as Fred Young, Jr., who received two probated sentences upon conviction for his participation in the murder of two persons, as reported in the San Antonio News Newspaper, January 19, 1973. (see Attachment I, page 41, of John J. Aguirre Transcript.)

Pettitioners were prepared to present to the Court all relevant information as to their character, background, talents, employment, etc., so the Court could make an intelligent decision as to probation "if the ends of justice and the best interests of the public as well as the defendant will be subserved thereby," Article 42.12, V.A.C.C.P. of Texas, Section 3.

Instead of a hearing as that term is commonly understood, the Trial Court conducted summary proceedings, firstly informing Pettitioners of the denial of their application for probation, secondly informing Pettitioners of the denial of their Motion for New Trial and thirdly not taking any action whatever upon Defendant's Motion to Reconsider Probation. There is as much speculation as to whether or not the Trial Court considered matters other than the quantity of Marijuana in its decision is the proper determinative factor to decide that the ends of justice and the best interest of the public as well as of the Pettitioners would not best be served by granting Petitioners probation.

It is well settled that the burden rests upon the defendant to prove his eligibility for probation; however, practice under Article 42.12 may well mitigate against such maxim. Section 4 et seq of Art. 42.12 provides a procedure whereby a state agency (ie. Probation Department of the County) will, upon the Court's direction, "fully investigate and report to the Court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant" and further provides for a physical and mental examination of defendant (Sec. 4). The Trial Court here directed the Petitioners to submit to such a report (SF 30) and little else can be found in the record save statements by Petitioners to the Court prior to sentencing and allegations in their Motion For New Trial. This procedure seems to be ineffective, costly

and burdensome in this case insofar as the Trial Court had knowledge of the quantity of contraband involved upon filing of stipulations in the record (CA-TR 13; JA-TR 14) prior to sending Petitioners to the probation office.

Upon review of the record we repeatedly are shown where the Trial Court had ample authority and opportunity to allow Petitioners to make a fair presentation of relevant information to the Court and to rebut the "persuasive" factor of the Court given as its reasoning denying Petitioners probation. Although Petitioners' Counsel may have made a misjudgment for not securing a ruling from the Court on their Motion to Reconsider Probation, it is understandable that pursuit of same would have been fruitless and that the Trial Court's failure to act is tantamount to overruling such Motion and similar arguments as those in the Motion to Reconsider were summarily dismissed by the Trial Court's overruling Petitioners' Motion for New Trial.

It is also significant to note at this time that no notice was issued by the Trial Court re the "hearing" times and places for Petitioners Application for Probation and Motion for New Trial.

Petitioners refer to UNITED STATES vs. ESPINOZA, 5th Cir., 481 F 2d 553 (July 1973), as analogous in its facts and controlling in its law. There, the Defendant, Espinoza, plead guilty to an offense involving the distribution of heroin and received a more lengthy sentence than his co-defendants. Prior to sentencing, Espinoza's attorney was allowed to argue in favor of Espinoza's character and background and immediately prior to announcing the three sentences (i.e. for 3 co-defendants), the Court made the following remarks on the record:

> "One of the Defendants has been in trouble before, but they are all part of what seems to be a very serious problem, and whether they have ever actually been convicted or not, Mr. Espinoza, your record is bad, your record for threats and assaults."

There, as in the case at bar, there was no mention of a pre-sentence report and Espinoza's Counsel never requested disclosure of the report if in fact one existed. A Motion was presented by Espinozo's attorney to the Court to present evidence to rebut the Court's statement and apparent presumption that Appellant's record for threats and assaults was bad. Without explanation the Court denied the request to submit evidence and overruled the motion for reduction of sentence.

Justice Goldberg in his said ESPINOZA opinion drew still another parallel to this case by observing his Court was not asked to review the length of sentence, there was no contention that the sentence itself was illegal and it was undisputed that the sentence itself was within the statutory limit nd, finally, the Court was not presented with any of the increasingly troublesome problems involved with disclosure of pre-sentence reports. Justice Goldberg continues at page 555:

> "What is involved here is the right of a defendant to at least minimal safeguards to insure that the sentencing Court does not rely on erroneous factual information when assessing sentence.
>
> From the record in this case, it is readily apparent that the Court below relied, at least in part, on Appellants "bad record" when assessing Appellant a longer sentence than his co-defendants, both of whom were charged with considerably more than Appellant."

The opinion goes on to recite that Appellant "... sought only an opportunity to present facts that he claimed would dispel the allegedly erroneous assumption." Petitioners Altsman and Aguirre should have been allowed to present evidence showing their entitlement to probation as well as to rebut the erroneous assumption of the Trial Court that the quantity of Marijuana is a valid and proper criteria in and of itself upon which to qualify or disqualify a defendant for probation.

Justice Goldberg's reasoning and case citations are appropriate and controlling here, as he states on page 555:

> "Implicit in the (Supreme) Courts holding in Tucker is the principle that despite the broad discretion left to the trial judge of assessing background information for sentencing purposes, a defendant retains the right not to be sentenced on the basis of invalid premises, U.S. v TUCKER, 404 US 443, 30 L. Ed 2d 592 (1972)," WILLIAMS vs. NEW YORK, 337 US 241, 93L Ed 1337 (1949)
>
> RUSSO vs US.S., 5th Cir. 1972, 470 F 2nd 1357, and others.

In TOWNSEND vs. BURKE, 1948, 334 U.S. 736, 92L Ed 1690, defendant challenged the fairness of the sentencing procedure where the Judge had relied on apparently erroneous factual information in assessing sentence. The Supreme Court granted the requested habeas corpus relief and stated inter alia:

> "This prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result whether caused by carelessness or design is

inconsistent with due process of law and such conviction cannot stand." (Emphasis added)

One can only speculate as to the reason for the Trial Court below to utilize the quantity of Marijuana as being "persuasive." Even if one were to presume the Trial Court Judge believed such amount to be conclusive of selling or "dealing" in the drug, or of possession with intent to sell, such presumption would constitute placing an assumption on top of an assumption, in that one would first have to assume the mere quantity of the drug one possesses is conclusive of other criminal acts (i.e. selling) and that such reliance upon other criminal acts constitutes a valid and proper sole criteria for determination of eligibility for probation. The Texas probation statute does not have criteria specifically set out and the guarantee of due process of law requires that assumptions be excluded. The reasoning for the safeguards of due process in this area of sentencing is a matter of common sense and fairness and is appropriately set out in a series of decisions by Justice Goldberg in his Espinoza decision, to-wit: In U.S. vs. MALCOLM, 2nd Cir. 1970, 432 F 2d 809, a case involving erroneous information:

> "The result of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing Judge should know all the material facts.
>
> The information which was curtailed and precluded here should therefore have been received and considered.
>
> Fair administration of justice demands that the sentencing judge will not act on surmise, mis-

information and suspicion but will impose sentence with insight and understanding. HARRIS vs. U.S. 382 U.S. 162, 15 L Ed 2d 240 (1965)."

The Ninth Circuit Court of Appeals vacated the sentence predicated on unreliable hearsay and held in U.S. vs. WESTON, 1971, 448 F 2d 626:

> "In TOWNSEND vs. BURKE, supra, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." (At 634)

The need for well educated insight into the sentencing process as opposed to unbridled discretion of the sentencing Court is in conformity with fundamental due process. The gathering of relevant information and intelligently considering same appears to be the public policy of Texas in view of Article 42.12. The balance between properly exercised discretion and abuse thereof hinges upon due process in Justice Goldberg's opinion, at page 558 of Espinoza.

> "By endowing the district court with discretion in sentencing, it is presupposed that such discretion will be exercised consistent with both the appearance and reality of due process. The action of the Court below, in refusing to permit rebuttal of the stated actual basis for the sentence, is tantamount to an abuse of discretion and is inconsistent with the need for enlightened sentencing.

> Despite an ever increasing body of criticism attacking the sentencing process, the process continues to depend almost entirely upon the "discretion" of the sentencing judge.
>
> This discretion is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences, it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determinnd."

The construction by the Court of Criminal Appeals of Texas of Judge's discretion exercised pursuant to Article 42.12 has in prior cases revealed language that places near absolute discretion in such matters with the Trial Court, never completely ruling out the issue presented here of denial of due process. The discretion of the Trial Courts of Texas to restrict liberty and freedom is effectively unbridled as the Court of Criminal Appeals have consistently held that such decisions are not reviewable. See Trautschold v. State, Supra.

Petitioners have been denied the opportunity to meet their burden of proof showing they are entitled to probation and have been unfairly and improperly judged; whether this denial was by "carelessness or design" is not the controlling issue.

Regardless of whether or not the probation statute is vague and indefinite, the conduct of the Trial Court effectively denied Appellants' right to be heard and the Trial Court's reasoning can in no way find justification or support as same is groundless, unreasonable, without merit and bears no substantial and material relevance to the guidelines set out in Section 3 of Article 42.12. The Trial Court has further breached due process by failing to make an educated search into

the facts available to properly determine the eligibility of Petitioners for probation in accordance with the duty imposed upon it for the safeguard of Petitioners by the Texas Court of Criminal Appeals decision in McNEESE vs. STATE, 1971, 468 SW 2d 800, where Judge Douglas held at page 801:

> "The trial court in such cases should use the probation officer's report and take into consideration all of the pertinent information to more intelligently determine if the person convicted is entitled to probation."

In the case at bar, the Texas Court of Criminal Appeals refused to consider the review of the Trial Court's denial of Appellant's probation motion by denying Appellant's Motion for Leave to File Motion for Rehearing.

V. Is Article 42.12 of the Code of Criminal Procedure of Texas (1965) so vague and indefinite as to deny due process and equal protection of law guaranteed by the Fifth, Ninth and Fourteenth Amendments of the United States Constitution?

On its face Article 42.12, Vernon's Annotated Code of Criminal Procedure of Texas (V.A.C.C.P.), Arts. 1959, 59th Leg., Vol. 2, p. 317 ch. 722, Sections 1 through 11 of the act cannot be clearly understood from a reading thereof.

Insofar as the probation sections (i.e. Sec. 1-11) attempt to grant the courts of the judiciary the responsibility and power to suspend the imposition of sentences of criminal courts by placing the defendant on probation, the said probation law falls within the penal law structure of the Texas judicial system and should

therefore be strictly construed.

The significance and importance of the probation law is stressed when considering the effect of the law, to-wit: a defendant satisfying the eligibility provisions of the act will not have severe restrictions placed upon his liberty and freedom by virtue of not being ordered to jail or prison. The imposition of probation carries some restrictions and limitations but much less severe than confinement or incarceration.

To become eligible for probation, Sec. 3 specifies as follows:

> "..when it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public as well as the defend- and will be subserved thereby.. (the Court) shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the dd- fendant does not exceed ten years imprisonment, to suspend the imposition of sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided..." (emphasis added)

Petitioner challenges the underlined provisions immediately above as being vague, indefinite and uncertain to such an extent a criminal defendant is incapable of understanding the necessary criteria which he must meet to become eligible for probation, nor is his attorney or advisor capable of understnading same to properly advise the defendant as to his eligibility. Men of common intelligence must necessarily guess at the meaning of the terms of the Act and it should, therefore, be held invalid, BAKER vs. STATE, 1972, 478,

SW 2d 445. See also HIEH vs. UNITED STATES, 415 F. 2d 664, cert. denied 90 S. Ct. 941, 25 L. Ed 2d 117, and MEDRANO vs. ALLEE, 347 F. Supp. 605 (Tex. D.C.). Such vagueness and indefiniteness violates the right of the accused to "demand and nature and cause of the accusation against him" in that the defendant must be able to clearly know what he is charged with as well as know what punishment will and can be inflicted; see STATE vs. SHOPPERS WORLD, INC. (Tex. S. Ct.), 380 SW 2d 107.

As applied, the vague and uncertain criteria leaves the sentencing judge with such broad discretion that the courts have held such decision of the judge "not appealable," TRAUTSCHOLD vs. STATE, 1971, 466SW 2d 586, the entitlement of accused to probation "rests absolutely with trial courts discretion," MARTIN vs. STATE, 1970, 452 SW 2d 481, and that when a probation matter is before the Court, the Trial Court "has absolute and unreviewable discretion to refuse or grant probation," SALDANA vs. STATE, 1973, 493 SW 2d 778. However, this Court has on other occasions considered the abuse of discretion of the trial court as in MARR vs. STATE, 1972, 487 SW 2d 93 and McNEESE vs. STATE, 1971, 468 SW 2d 800, holding the decision of the sentencing judge not to be an abuse of discretion.

The failure to provide specific guidelines or criteria helping define "the ends of justice" and the "best interests of the public.."as well as the defendant" renders the statute ineffective and void. In its application the failure to so provide forces the sentencing judge to determine on his own and in his sole discretion the eligibility of applicants, subject to the personal whim, desire, prejudice, ignorance, caprice, carelessness or misunderstanding of such judge. Under these circumstances and in view of the numerous Texas decisions refusing to override such heretofore acceptable

broad discretionary powers, one would hope the magistrate would highly perform his public trust by intelligently seeking out all the available information upon which to form the foundation of his opinion. To place such an extraordinary burden upon the sentencing judge constitutes unreasonable and arbitrary action by the legislature which results additionally in the inability of defendant to properly prepare to meet his burden of proof showing eligibility very simply because defendant is uncertain as to what constitutes the elements of his burden of proof. The apparent lack of specific uniform standards for defendant and judge and/or jury to follow promulgates severe unequal applications of the laws which is damaging to the defendant as well as the legal profession and society. The irregularity of probation decisions substantiates denial of due process (as treated in ESPINOZA, supra, as an example) and equal protection (as treated in Tyler murder case compared to case at bar as an example, supra) and materially affects defendants' exercise of freedom and liberty, as was done to Petitioners Altsman and Aguirre, creates disrespect for law and the judiciary and further solidifies an unjust and unfair essential element of our penal system (i.e. sentencing) through the inability of the probation regulations to be carried out in conformity with fundamental constitutional principals of due process

CONCLUSION

For these reasons, a Writ of Certiorari should issue and the decision of the Court of Criminal Appeals of Texas should be reversed.

Respectfully Submitted:

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June 24, 1974

APPENDICES

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CHARLES DEWEY ALTSMAN, Appellant

NO. 48,232 V Appeal from Bexar County

THE STATE OF TEXAS, Appellee

JOHN J. AGUIRRE, Appellant

NO. 48,233 v Appeal from Bexar County

THE STATE OF TEXAS, Appellee

OPINION

These appeals are from convictions of possession of marihuana in a joint trial before the court on plea of guilty. Punishment of each appellant was assessed at three (3) years' confinement.

The sufficiency of the evidence to sustain the convictions is not challenged.

All of the appellant's grounds of error center around the constitutionality of Article 725b, V.A.P.C.[1] They read as follows:

"I.

"INSOFAR AS IT PERTAINS TO MARIHUANA, THE TEXAS UNIFORM NARCOTIC DRUG ACT, TEX. PENAL CODE ANN. ART. 725b (1961), IS IN SUCH POSITIVE CONFLICT WITH THE FEDERAL COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1910, 21 U.S.C.A. & 801 ET SEQ., THAT THE TWO CANNOT STAND TOGETHER AND IS, THEREFORE, INVALID.

"II.

"THE TEXAS UNIFORM NARCOTIC DRUG ACT, TEXAS PENAL CODE ANN. ART. 725b (1961), DEPRIVES APPELLANTS OF THEIR RIGHTS OF PRIVACY AND FUNDAMENTAL LIBERTY GUARANTEED BY THE TEXAS CONSTITUTION AND BY THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS, AND BY THE NINTH AMENDMENT, AS THOSE RIGHTS HAVE BEEN CONSTRUED BY THE SUPREME COURT, INSOFAR AS SUCH ACT CRIMINALIZES THE PRIVATE POSSESSION AND USE OF MARIHUANA BY ADULTS IN THE STATE OF TEXAS.

"III.

"THE LEGISLATURE'S 1971 DEFINITION OF MARIHUANA AS A 'NARCOTIC DRUG' WAS SO AGAINST THE GREAT WEIGHT OF SCIENTIFIC AND MEDICAL KNOWLEDGE THAT IT WAS ARBITRARY, UNREASONABLE AND CAPRICIOUS, BEING BEYOND THE POWER OF THE LEGISLATURE, AND CONSTITUTES A DENIAL OF DUE PROCESS AND EQUAL PROTECTION.

"IV.

"THE TEXAS UNIFORM NARCOTIC DRUG ACT,

1/ These convictions were under the provisions of Article 725b, V.A.P.C. prior to the effective date of the new Controlled Substance Act, Acts of 63rd Legislature, 1973, Chapter 429. Among the numerous changes it makes in prior drug acts, the Controlled Substance Act defines "marihuana" and "narcotic drug" separately.

TEXAS PENAL CODE ANN. ART. 526b (1961), ON ITS FACE AND AS APPLIED CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ART. I., SECT. 13, OF THE TEXAS CONSTITUTION AND THE EIGHTH AMENDMENT TO THE U. S. CONSTITUTION, INSOFAR AS IT IMPOSES CRIMINAL SANCTIONS UPON THE PRIVATE POSSESSION AND USE OF MARIHUANA BY ADULTS IN THE STATE OF TEXAS."

The contentions of appellants contained in their first, third and fourth grounds of error were decided against them in MORSE v. STATE, 502 S.W.2d 805, and in the authorities there cited. We are not persuaded to change our views by the arguments made in counsel's brief, and we do not see any gain in a repetition of the reasons there given in overruling appellants' contentions. These grounds of error are overruled.

In MILLER v. STATE, 458 S.W.2d 680, 684, we upheld the constitutionality of Article 725b, V.A.P.C., against the contention that it infringed upon an individual's constitutional rights of privacy and fundamental liberty. See also BROOM v. STATE, 463 S.W.2d 220, cert. den., 402 U.S. 933, 91 S.Ct. 1523, 28 L. Ed.868. For the reasons stated in those cases and the authorities therein cited, we overrule appellants' second ground of error.

The judments are affirmed.

Per Curiam

(Delivered March 6, 1974)

Art. 725b. NARCOTIC DRUG REGULATIONS

Definitions

Section 1. The following words and phrases, as used in this Act, shall have the following meanings, unless the context otherwise requires:

(1) "Person" includes any corporation, association, copartnership, or one or more individuals.

(2) "licensed Physician." Licensed physicians for the purpose of this Act are defined as any person, duly licensed and whose license is current in all respects as issued by the Texas State Board of Medical Examiners or the State Board of Chiropody Examiners.

(3) "Dentist" means a person authorized by law to practice dentistry in this State.

(4) "Veterinarian" means a person authorized by law to practice veterinary medicine in this State.

(5) "Manufacturer" means a person who by compounding, mixing, cultivating, growing, or other process, produces or prepares narcotic drugs, but does not include an apothecary who compounds narcotic drugs to be sold or dispensed on prescriptions.

(6) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions.

(7) "Apothecary" means a licensed pharmacist as defined by the laws of this State and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this Act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege that is not granted to him by the Pharmacy Laws of this State.

(8) "Hospital" means any institution for the care and treatment of the sick and injured, duly regis-

tered under the Federal Narcotic Laws as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian as defined herein.

(9) "Laboratory" means a laboratory duly registered under the Federal Narcotic Laws or approved by the State Department of Public Health as proper to be entrusted with the custody of narcotic drugs.

(10) "Sale" includes barter, exchange, or gift, or offer therefor, and, each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(11) 'Coca Leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves except derivatives of coca leaves which do not cotain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(12) "Opium" includes morphine, codein, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine, or any of its salts.

(13) The term "Cannabis" as used in this Act shall include all parts of the plant Cannabis Sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of such plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the non-resinous oil obtained from such seed, nor the mature stalks of such plant, nor any product or manufacture of such stalks, except the resin extracted therefrom and any compound, manufacture, salt, derivative, mixture, or preparation of such resin. The term "Cannabis" shall include those varieties of Cannabis known as Marihuana, Hashish and Hasheesh.

(14) "Narcotic drugs" means coca leaves,

opium, cannabis, amidone, isonipecaine and every substance neither chemically nor physically distinguishable from them; also opiates, which shall mean any drug having an addiction-forming or addiction-sustaining liability similar to opium or cocaine; substances which are now listed in, or may be added subsequently to, Schedule II, Title II, Part B, Section 202, under the provisions of the Comprehensive Drug Abuse and Prevention and Control Act of 1970.

(15) "Federal Narcotic Laws" means the laws of the United States relating to drug abuse, cited as Public Law 91-513, 91st Congress, H.R. 18583, the Comprehensive Drug Abuse and Prevention and Control Act of 1970.

(16) "Official written order" means an order written on a form as provided in the Comprehensive Drug Abuse and Prevention and Control Act of 1970. Sec. 1(14)-(16) amended by Acts 1971, 62nd Leg., p. 3069, ch. 1023, & 1, eff. June 15, 1971.

(17) "Dispense" includes distribute, leave with, give away, dispose of, or deliver.

(18) "Registry number" means the number assigned to each person registered under the Federal Narcotic Laws.

(19) "Isonipecaine" shall mean any substance identified chemically as 1-methyl-4-carboxylic acid ethyl ester, or any salt thereof, by whatever trade name designated.

(2) "Amidone" shall mean any substance identified chemically as 4-4-Diphenyl-6-Dimethylamino-Heptanone-3, or any salt thereof, by whatever trade name designated. As amended Acts 1953, 53rd Leg., p. 812, ch. 328, & 1; Acts 1954, 53rd Leg., 1st C.S., p. 103, ch. 50, & 1.

Acts prohibited

Sec. 2. (a) It shall be unlawful for any person

to manufacture, possess, have, control, sell, prescribe, administer, dispense , compound, offer to sell, or offer to buy any narcotic drug. Proof of an offer to sell must be corroborated by a person other than the offeree or by evidence other than a statement of the offeree.
Sec. 2(a) amended by Acts 1971, 62nd Leg., p. 2912, ch. 963, & 1, eff. June 15, 1971.

(b) It shall be unlawful for any person to possess an opium pipe, instrument, or contrivance used in smoking a narcotic drug.

(c) It shall be unlawful for any person except a physician, dentist, veterinarian, nurse, pharmacist, dealer in surgical instruments, or an attendant or intern of a hospital, sanatorium, or institution in which persons are treated for disability or disease, at any time to have, or possess a hypodermic syringe or needle or any instrument adapted for the use of narcotic drugs by subcutaneous injections in a human being and which is possessed for that purpose, unless such possession is for the purpose of subcutaneous injection of a drug or drugs, or medicines, the use of which is authorized by the direction of a licensed physician.

(d) Nothing in this Act shall apply to any hypodermic syringe or needle, or other instrument or paraphernalia used for the purpose of vaccinating or otherwise treating livestock. As amended Acts 1955, 54th Leg., p. 1027, ch. 386, & 1.

Authorized acts

Sec. 2A. It shall not be unlawful to manufacture, possess, have, control, sell, offer to sell, offer to buy, prescribe, administer, dispense, or compound any narcotic drug or any hypodermic syringe, needle, or other instrument adapted to the use of narcotic drugs where same is authorized under the terms of this Act."

Sec. 2A amended by Acts 1971, 62nd Leg., p. 2913, ch. 963, § 2, eff. June 15, 1971.

Manufacturers and wholeslers

Sec. 3. Repealed. Acts 1943, 48th Leg., p. 703, ch. 391.

Qualification for licenses

Sec. 4. Repealed. Acts 1953, 53rd Leg., p. 812, c. 328, § 2.

Sale on written orders

Sec. 5 With the exception of heroin and cannabis whose sale or possession is illegal under all conditions and circumstances except where authorized for use in research:

(1) A manufacturer or wholesaler duly registered under the Federal Narcotic Laws may sell and dispense narcotic drugs to any of the following persons, but only on official written orders;

(a) To a manufacturer, wholesaler, or apothecary.

(b) To a physician, dentist, or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific or medical purposes.

(2) A manufacturer or wholesaler duly registered under the Federal Narcotic Laws may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the Federal Narcotic Laws, to a person in the employ of the United States Government, or of any State, territorial, dis-

trict, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or to a physician or surgeon duly licensed in some State, Territory, or the District of Columbia to practice his profession, or to a retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft, for the actual medical needs of persons on board such ship or aircraft when not in port. Provided, such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft or to the physician, surgeon, or retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States Public Health Service.

(c) To a person in a foreign country if the provisions of the Federal Narcotic Laws are complied with.

(3) An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two (2) years in such way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this Act. It shall be deemed a compliance with this Subsection if the parties to the transaction have complied with the Federal Narcotic Laws, respecting the requirements governing the use of order forms.

(4) Possession of or control of narcotic drugs

obtained as authorized by this Section shall be lawful if in the regular course of business, occupation, profession, employment, or duty of the possessor.

(5) A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other State, or of any political subdivision thereof, or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly licensed in some State, Territory, or the District of Columbia, to practice his profession, or a retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft, who obtains narcotic drugs under the provisions of this Section or otherwise, shall not administer nor dispense, nor otherwise use such drugs, within this State, except within the scope of his employment or official duty, and then only for scientific or medical purposes and subject to the provisions of this Act.
Sec. 5 amended by Acts 1971, 62nd Leg., p. 3069, ch. 1023, & 2, eff. June 15, 1971.

Sales by apothecaries

Sec. 6. (1) An apothecary in good faith may sell and dispense narcotic drugs to any person upon written prescription, or an oral prescription in pursurance to regulations promulgated by the U. S. Commissioner of Narcotics under Federal narcotic laws, of a physician, dentist, or veterinarian, dated and signed by the person prescribing, on the second day after the same is issued and bearing in full, name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under the Federal narcotic laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the

species of the animal for which the drug is prescribed. The person filling the prescription shall write the date of the filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection for a period of two years, so as to be readily accessible for inspection by any public official or employee engaged in the enforcement of this Act. The prescription shall not be refilled. As amended Acts 1955, 54th Leg., p. 1215, ch. 486, & 1.

(2) The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, or apothecary, but only on an official written order.

(3) An apothecary, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty (20) per cent of the complete solution, to be used for medical purposes.

Professional use of narcotic drugs

Sec. 7. (1) With the exception of heroin and cannabis, whose sale or possession is illegal under all conditions and circumstances except where authorized for use in research:

(a) A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision.

(b) A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer,

and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

(2) Any person who has obtained from a physician, dentist, or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist, or veterinarian, shall return to such physician, dentist, or veterinarian any unused portion of such drug, when it is not longer required by the patient.

Sec. 7 amended by Acts 1971, 62nd Leg., p. 3070, ch. 1023, & 3, eff. June 15, 1971.

Preparations exempted

Sec. 8. Except as otherwise in this Act specifically provided, this Act shall not apply to the following cases:

Administering, dispensing, or selling at retail of any medicinal preparation that contains in one (1) fluid ounce, or if a solid or semi-solid preparation, in one (1) avoirdupois ounce, not more than one (1) grain of codeine or of any of its salts.

The exemption authorized by this Section shall be subject to the following conditions: (1) That the medicinal preparation administered, dispensed, or sold, shall contain in addition to the narcotic drug in i, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and (2) that such preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this Act.

Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or

sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold, in compliance with the general provisions of this Act. As amended Acts 1941, 47th Leg., p. 647, ch. 392, § 1.

Sec. 8A. It shall be unlawful for any person to sell or dispense any preparation listed in Section 8 to any person under the age of eighteen (18) years except on a prescription issued by a physician or dentist, and no sale shall be made to such eighteen (18)-year-old unless such eighteen (18)-year-old properly identifies himself by means of a valid driver's license or other proper identification, provided that not more than four (4) ounces of any preparations listed in Section 8 can in any event be sold to such eighteen (18)-year-old within a forty-eight (48) hour period. Sec. 8A added by Acts 1971, 62nd Leg., p. 3071, ch. 1023, § 4, eff. June 15, 1971.

Record to be kept

Sec. 9. (1) (Physicians, Dentists, Veterinarians, and other Authorized Persons). Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this Subsection if any such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solutions or other preparations, purchased or made up by him, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Provided, that no record need be kept of nar-

cotic drugs administered, dispensed, or professionally used in the treatment of any one (1) patient, when the amount administered, dispensed, or professionally used for that purpose does not exceed in any forty-eight (48) consecutive hours: (a) four (4) grains of opium; or (b) one-half (½) of a grain of morphine or any of its salts; or (c) two (2 grains of codeine or any of its salts; or (d) one-fourth (¼) of a grain of heroin or any of its salts; or (3) a quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated. Provided further, that any person may purchase at any time (one (1) ounce of paregoric without a doctor's prescription. As amended Acts 1941, 47th Leg., p. 647, ch. 392, § 2; Acts 1943, 48th Leg., p. 346, ch. 225, § 1.

(2) (Manufacturers and Wholesalers). Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of Subsection 5 of this Section.

(3) (Apothecaries). Apothecaries shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of Subsection 5 of this Section.

(4) (Vendors of Exempted Preparations). Every person who purchases for resale, or who sells narcotic drug preparations exempted by Section 8 of this Act, shall keep a record showing the quantities and kinds thereof received and sold or disposed of otherwise, in accordance with the provisions of Subsection 5 of this Section.

(5) (Form and Preservation of Records). The record of narcotic drugs received shall in every case

show the date of receipt, the name and address of the person from whom received, and the kind and quantity of narcotic drugs produced or removed from process of manufacture and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced, and the proportion of resin contained in or producible from the plant Cannabis Sativa L. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered, or dispensed, and the kind and quantity of drugs. Every such record shall be kept for a period of two (2) years from the date of the transaction recorded. The keeping of a record required by or under the Federal Narcotic Laws, containing substantially the same information as is specified above, shall constitute compliance with this Section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft. As amended Acts 1953, 53rd Leg., p. 812, ch. 328, & 4.

Labels

Sec. 10. (1) Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind, and form of narcotic drug contained therein. No person, except an apothecary for the

purpose of filling a prescription under this Act, shall alter, deface, or remove any label so affixed.

(2) Whenever an apothecary sells of dispenses any narcotic drug on a prescription issued by a physician, dentist, or veterinarian, he shall affix to the container in which such drug is sold or dispensed a label showing his own name, address, and registry number, or the name, address, and registry number of the apothecary for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name and address, and registry number of the physician, dentist, or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface, or remove any label so affixed.

Authorized possession of narcotic drugs by individuals

Sec. 11. A person to whom or for whose use any narcotic drug has been prescribed, sold, or dispensed, by a physician, dentist, apothecary, or other person authorized under the provisions of Section 5 of this Act, and the owner of any animal for which any such drug has been prescribed, sold, or dispensed, by a veterinarian, may lawfully possess it only in the container in which it was delivered to him, by the person selling or dispensing the same.

Persons and corporations exempted

Sec. 12. The provisions of this Act restricting the possession and having control of narcotic drugs shall not apply to common carriers or to warehousemen, while engaged in lawfully transporting or storing such

drugs, or to any employee of the same acting within the scope of his employment; or to public officers or their employees in the performance of their official duties requireing possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.

Common nuisances

Sec. 13. Any store, shop warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance.

Contraband--Seizure

Sec. 14. All narcotic drugs, as herein defined, manufactured, sold, or had in possession contrary to any provision hereof, shall be, and the same are declared to be contraband, and shall be subject to seizure and confiscation by any officer or employee of the Department of Public Safety or by any peace officer who is authorized to and charged with the duty of enforcing the provisions of this Act.

Seizure without warrant

Sec. 15. Officers and employees of the Department of Public Safety, and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall have power and authority, without warrant, to enter and examine any build-

ings, vessels, cars, conveyances, vehicles, or other structures or places, when they have reason to believe and do believe that any or either of same contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act, or that the receptacle containing the same is falsely labeled, except when any such building, vessel, or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as hereinbelow provided.

Said officers and employees of the Department of Public Safety and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall further have power and authority, without warrant, to open and examine any box, parcel, barrel, package, or receptacle in the possession of any person which they have reason to believe, and do believe contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act and that the receptacle containing same is falsely labeled.

Officers and employees of the Department of Public Safety and peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, when acting under circumstances and conditions where a search or inspection is authorized without a warrant, as immediately hereinabove provided shall be given free access to and shall not be hindered or interfered with in their examination of buildings, vessels, cars, conveyances, vehicles, or other structures or places, and in case any officer or employee of the Department of Public Safety is hindered or interfered with in making such examination, any license held by the person preventing such free access or interfering or hindering such officers, employees, or employee, shall be subject to revocation by the Department of Public Safety.

Officers and employees of the Department of

Public Safety and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall have authority to take into their possession any and all narcotic drugs found by them as a result of any search or inspection without a warrant, as authorized by this Section of this Act provided that said officers shall be required to issue to the person from whose possession said narcotics are taken a receipt therefor if said person is present and to immmediately file a sworn inventory of all narcotic drugs taken with any magistrate in the county where said narcotic drugs are taken, and the retention and disposition of said narcotic drugs so taken by any said officer shall, after coming into his possession, be controlled by the applicable provisions of Section 16 hereof.

Search warrants--Issuance

Sec. 16. Whenever any officers or employee of the Department of Public Safety or any peace officer who has the authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magistrate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative thereto, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act. Upon the execution of such search warrant the officer executing the same shall make due return thereof to the Court issuing the same, together with a sworn inventory of all narcotic drugs taken thereunder. The Court

shall thereupon issue process against the person owning or controlling the narcotic drugs and upon return thereof it shall proceed to determine whether or not the same are held or possessed in violation of the provisions of this Act, and make up a finding to the effect that the drugs are so illegally held or possessed, a judgment shall be entered against the owner or person found in the possession of the same for the costs of the proceedings and provide for the disposition of the property forfeited, as provided by the terms hereof. In no event shall the narcotic drugs seized by any authorized person under authority of a search warrant or without authority of a search warrant be taken from the custody of any officer or other person authorized to seize same, by writ of replevin or other process, but the same shall be held by the officer to await the final judgment in such criminal proceedings as may be had thereon.

Narcotic drugs to be delivered to State officials, etc.

Sec. 17. All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) Except as in this Section otherwise provided, the Judge of the District Court having jurisdiction shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the said District Court and to the United States Commissioner of Narcotics, by the officer who destroys them.

(b) Upon written application by the Department

of Public Safety, for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the Department of Public Safety may in its discretion deliver any narcotic drugs that have come into its custody by authority of this Section to the applicant for medicinal use. The Department of Public Safety may from time to time deliver excess stocks of such narcotic drugs to the United States Commissioner of Narcotics, or may destroy the same.

(d) The Department of Public Safety shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received, and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all Federal or State Officers charged with the enforcement of Federal and State Narcotic Laws.

Notice of conviction to be sent to Licensing Board

Sec. 18. On the conviction of any person of the violation of any provisions of this Act, a copy of the judgment and sentence, and of the opinion of the Court or magistrate, if any opinion be filed, shall be sent by the Clerk of the Court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the Court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and

for good cause, said board or officer may reinstate such license or registration.

Fingerprints; information sent to Department of Public Safety

Sec. 18a. (1) The sheriffs, chiefs of police, members of the State Department of Public Safety, and any other law enforcement agencies and officers, shall immediately upon the arrest of any persons for any offense against the laws of this State relating to narcotic drugs, and immediately after the conviction of any person of violation of this Act, take the fingerprints of such person and forward copies thereof to the Department of Public Safety together with photographs and such other description and information as required by the Department of Public Safety.

(2) The Clerk of every Court of this State in which any person is prosecuted for an offense under the Laws of this State relating to narcotic drugs shall promptly report to the Department of Public Safety the sentence of the Court or other disposition of the case. Added Acts 1953, 53rd Leg., p. 812, ch. 328, & 5.

Records, confidential

Sec. 19. Prescriptions, orders, and records, required by this Act, and stocks of narcotic drugs, shall be open for inspection only to Federal, State, county, and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in Court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate

is a party.

Fraud or deceit

Sec. 20. (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a priviliged communication.

(3) No person shall willfully make a false statement in any prescription, order, report, or record, required by this Act.

(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(5) No person shall make or utter any false or forged prescription or false or forged written order.

(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

(7) The provisions of this Section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this Act, in the same way as they apply to transactions under all other Sections.

Exceptions and exemptions not required to be negatived

Sec. 21. In any complaint, information, or in-

ings, vessels, cars, conveyances, vehicles, or other structures or places, when they have reason to believe and do believe that any or either of same contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act, or that the receptacle containing the same is falsely labeled, except when any such building, vessel, or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as hereinbelow provided.

Said officers and employees of the Department of Public Safety and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall further have power and authority, without warrant, to open and examine any box, parcel, barrel, package, or receptacle in the possession of any person which they have reason to believe, and do believe contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act and that the receptacle containing same is falsely labeled.

Officers and employees of the Department of Public Safety and peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, when acting under circumstances and conditions where a search or inspection is authorized without a warrant, as immediately hereinabove provided shall be given free access to and shall not be hindered or interfered with in their examination of buildings, vessels, cars, conveyances, vehicles, or other structures or places, and in case any officer or employee of the Department of Public Safety is hindered or interfered with in making such examination, any license held by the person preventing such free access or interfering or hindering such officers, employees, or employee, shall be subject to revocation by the Department of Public Safety.

Officers and employees of the Department of

Penalties

Sec. 23. (1) Any person violating any provision of this Act shall, upon conviction be punished by confinement in the State penitentiary for not less than two (2) years nor more than life, and upon the second or any subsequent conviction therefor shall be punished by confinement in the penitentiary for life or for any term of years not less than ten (10, and the benefits of the suspended sentence law shall not be available to a defendant convicted for a violation of the provisions of this Act; provided that any person convicted of a first offense violation of this Act shall be entitled to the benefits of probation under the Adult Probation and Parole Law,[1] as provided therein.

(2) Any adult person who hires, employs, or uses a person under nineteen (19) years of age in unlawfully transporting, carrying, selling, giving away, preparing for sale, or peddling any narcotic drug, or who unlawfully sells, gives, furnishes, administers, or offers to sell, give, furnish or administer any narcotic drug to a person under nineteen (19) years of age shall, upon conviction, be punished by confinement in the penitentiary for life or for any term of years not less than five (5), and upon the second or subsequent conviction therefor shall be punished by death or by confinement in the penitentiary for life or for any term of years not less than ten (10), and the benefits of the suspended sentence law shall not be available to a defendant convicted for a violation of the provisions of this subsection. As amended Acts 1953, 53rd Leg., p. 812, ch. 328, § 6; Acts 1955, 54th Leg., p. 903, ch. 354, § 1; Acts 1957, 55th Leg., p. 215, ch. 101, § 1.

Article 781b.

Effect of acquittal or conviction under Federal Narcotic Laws

Sec. 24. No person shall be prosecuted for a violation of any provision of this Act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission which, it is alleged, constitutes a violation of this Act.

Uncorroborated accomplice testimony

Sec. 24a. Repealed. Acts 1953,, 53rd Leg., p. 812, c. 328, § 7.

Constitutionality

Sec. 25. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Interpretation

Sec. 26. This Act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those States which enact it.

Inconsistent laws repealed

Sec. 27. All Acts or parts of Acts which are inconsistent with the provisions of this Act are hereby repealed. Chapter 35, Page 45, Acts of the Regular Session of the Twenty-ninth Legislature, 1905, as amended by Chapter 150, Page 277, Acts of the Regular Session of the Thirty-sixth Legislature, 1919, as amend-

ed by Chapter 61, Page 156, Acts of the Second Called Session of the Thirty-sixth Legislature, 1919;[1] Chapter 150, Page 277, Acts of the Regular Session of the Thirty-sixth Legislature, 1919,[2] Chapter 97, Page 154, Acts of Regular Session, Forty-second Legislature, 1931, as amended by Chapter 204, Page 609, Acts, Regular Session, Forty-third Legislature, 1933,[3] are hereby expressly repealed.

1 Articles 720-722.

2 Articles 723-725.

3 Article 725a.

Name of Act

Sec. 28. This Act may be cited as the Uniform Narcotic Drug Act.

Time of taking effect

Sec. 29. This Act shall take effect and be in full force ninety (90) days after date of final adjournment. Acts 1937, 45th Leg., p. 333, ch. 169; Acts 1941, 47th Leg., p. 647, ch. 392, §§ 1, 2.

CODE OF CRIMINAL PROCEDURE

Art. 42.12 (781d) Adult Probation and Parole Law

A. Purpose of Article and Definitions

Sec. 1. It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on

parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of probations and paroles in the public interest.

Sec. 2. This Article may be cited as the "Adult Probation and Parole Law."

Unless the context otherwise requires, the following definitions shall apply to the specified words and phrases as used in this Article:

a. "Courts" shall mean the courts of record having original criminal jurisdiction;

b. "Probation" shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended;

c. "Parole" shall mean the release of a prisoner from imprisonment but not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Parole shall not be construed to mean a commutation of sentence or any other form of executive clemency;

d. "Probation officer" shall mean either a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants placed on probation; or a person designated by such courts for such duties on a part-time basis;

e. "Parole officer" shall mean a person duly appointed by the Director of the Division of Parole Supervision and assigned the duties of investigating

and supervising paroled prisoners to see that the conditions of parole are compled with;

f. "Board" shall mean the Board of Pardons and Paroles;

g. "Division" shall mean the Division of Parole Supervision of the Board of Pardons and Paroles; and

h. "Director" shall mean the Director of the Division of Parole Supervision.

B. Probations

Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. In all cases where the punishment is assessed by the jury and probation is recommended by the jury in accordance with Section 3a, the Court may in its discretion fix a period of probation that is equal to or less than the term of punishment assessed by the jury, but in no event may the period of probation be less than the minimum prescribed by law for the offense of which defendant was convicted. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

Sec. 3a. Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation upon written sworn motion made therefor by the defendant, filed before the trial begins. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court if the jury recommends it in their verdict.

If probation is granted by the jury the court may impose only those conditions which are set forth in Section 6 hereof.

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in SEc. 3a above, a defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Sec. 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show cause why his probation should not be revoked; and if such a defendant requests such right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set forth in said Sec. 8 of this Article shall be followed.

Sec. 3c. Nothing herein shall limit the power of the court to grant a probation of sentence regardless

of the recommendation of the jury or prior conviction of the defendant.

Sec. 4. When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. If a defendant is committed to any institution the probation officer shall send a report of such investigation to the institution at the time of commitment.

Sec. 5. Only the court in which the defendant was tried may grant probation, fix or alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent. After a defendant has been placed on probation, jurisdiction of the case may be transferred to a court of the same rank in this State having geographical jurisdiction where the defendant is residing or where a violation of the conditions or probation occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court. Any court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the court having jurisdiction of the case at the time the action is taken.

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, how-

ever, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions or probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine; and

i. Support his dependents.

Sec. 6a. (a) A court granting probation may fix a fee not exceeding $10 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation.

(b) The court shall distribute the fees received under Subsection (a) of this section to the county or counties in which the court has jurisdiction for use in administering the probation laws. In instances where a district court has jurisdiction in two or more counties, the court shall distribute the fees received to the counties in proportion to population as prescribed by Paragraph 7, Section 10 of this Article.

Sec. 7. At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever

is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. Thereupon, the court shall cause the defendant to be brought before it and after a hearing without a jury, may either continue or revoke the probation. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a

shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment mot less than the minimum prescribed for the offense of which the probationer was convicted.

(b) Any probationer who removes himself from the State of Texas without permission of the court having jurisdiction of the case, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve. The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

Sec. 9. If, for good and sufficient reasons, probationers desire to change their residence within the State, such transfer may be effected by application to their supervising probation officer, which transfer shall be subject to the court's consent and subject to such regulations as the court may require in the absence of a probation officer in the locality to which the probationer is transferred.

Sec. 10. For the purpose of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in the county or counties, if applicable, are authorized, with the advice and consent of the commissioners court as hereinafter provided, to employ and designate the titles and fix the salaries of probation officers, and such administrative, supervisory, stenographic, clerical, and other personnel as may be necessary to conduct presentence investigations, supervise and rehabilitate

probationers, and enforce the terms and conditions of probation. Only those persons who have successfully completed education in an accredited college or university and two years full time paid employment in responsible probation or correctional work with juveniles or adults, social welfare work, teaching or personnel work; or persons who are licensed attorneys with experience in criminal law; or persons who are serving in such capacities at the time of the passage of this Article and who are not otherwise disqualified by Section 31 of this Article, shall be eligible for appointments as probation officers; providing that additional experience in any of the above work categories may be substituted year for year for the required college education, with a maximum substitution of two years. Provided, however, that in a county having a population of less than 50,000 according to the last preceding Federal census, any person having completed at least two years education in an accredited college or university will be eligible for appointment.

It is the further intent of this Article that the caseload of each probation officer not substantially exceed seventy-five probationers.

Where more than one probation officer is required, the judge or judges shall appoint a chief adult probation officer or director, who, with their approval, shall appoint a sufficient number of assistants and other employees to carry on the professional, clerical, and other work of the court.

The judge or judges, with the approval of the juvenile board of the county, may authorize the chief probation or chief juvenile officer to establish a separate division of adult probation and appoint adult probation officers and such other personnel as required. It is the further intent of this Act that the same person serving as a probation officer for juveniles shall not be required to serve as a probation officer for adults and vice-versa.

The judge or judges may, with the approval of the director of parole supervision, designate a parole officer or supervisor employed by the Division of Parole Supervision as a probation officer for the county or district.

Probation officers shall be furnished transportation, or alternatively, shall be entitled to an automobile allowance for use of personal automobile on official business, under the same terms and conditions as is provided for sheriffs.

The salaries of personnel, and other expenses essential to the adequate supervision of probationers, shall be paid from the funds of the county or counties comprising the judicial district or geographical area served by such probation officers. In instances where a district court has jurisdiction in two or more counties, the total expenses of such probation services shall be distributed approximately in the same proportion as the population in each county bears to the total population of all those counties, according to the last preceding or any future Federal Census. In all the instances of the employment of probation officers, the responsible judges and county commissioners are authorized to accept grants or gifts from other political subdivisions of the state or associations and foundations, for the sole purpose of financing adequate and effective probationary programs in the various parts of the state. For the purposes of this Act, the municipalities of this state are specifically authorized to grant and allocate such sums of money as their respective governing bodies may approve to their appropriate county governments for the support and maintenance of effective probationary programs. All grants, gifts, and allocations of the character and purpose described in this section shall be handled and accounted for separately from other public funds of the county.

Sec. 11. For the purpose of determining when fees are to be paid to any officer or officers, the placing

of the defendant on probation shall be considered a final disposition of the case, without the necessity of waiting for the termination of the period of probation or suspension of sentence.

Sec. 12. The provisions of Sections 6a, 10, and 11 of this Article also apply to Article 42.13.

SUPREME COURT, U. S.
AUG 23 1974
MICHAEL RODAK, JR., CLERK

NO. 73-1940

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

CHARLES DEWEY ALTSMAN
and
JOHN J. AGUIRRE,

Petitioners

V.

STATE OF TEXAS,

Respondent

On Petition for Part of Centivar
To The Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is not yet reported. A copy of the opinion is also attached to the petition herein.

JURISDICTION

Respondent is not aware of the exact date of filing of the petition herein and so is unable to state with certainty whether the time requirements for the filing of a petition for writ of certiorari have been met. In any event, Respondent disputes Petitioner's contentions that rights guaranteed by the Constitution of the United States have been violated.

QUESTION PRESENTED

The central question presented by the petition is that the penal laws of Texas as they existed at the time of Petitioner's trial imposed overly harsh penalties for the private possession of marijuana. From this initial premise, arises Petitioner's assertion that marijuana was improperly classified as a narcotic drug at the time of Petitioner's trial, that the Eighth Amendment to the United States Constitution is offended by the imposition of impermissible penalties, that punishment for private possession in the home violates the First Amendment freedom of self expression, that the Texas narcotics law (as then written) was in conflict with the federal narcotics law and that the probation laws of Texas are deficient in not recognizing, in full measure, the good character of defendants in marijuana possession cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution are involved.

Also involved are Article 725b of the Texas Penal Code of 1925 and Article 42.12 of the Code of Criminal Procedure of 1966, the Adult Probation and Parole law of Texas.

STATEMENT OF THE CASE

Petitioners were charged with the possession of marijuana and pled guilty in a joint trial before the court. An application for probation was filed, but was denied and the court set punishment at three years confinement for each of the Petitioners. Appeal was taken to the Court of Criminal Appeals of Texas which affirmed the judgment of conviction on March 6, 1974. This petition for writ of certiorari followed.

ARGUMENT AND AUTHORITIES

1. *The Wisdom of the Texas Legislature In Classifying Marijuana as a "Narcotic Drug" and in Setting Penalties for Possession, Should Not Be Questioned By The Courts*

Perhaps the most firmly established principle in the constitutional law is the rule that the wisdom, necessity

and motivation of a legislature in enacting laws will not be subject to judicial scrutiny and review.

The rule (or rules) is stated in American Jurisprudence (16 Am. Jr., pages 374 through 384, the Article on Constitutional Law) as follows:

> "The wisdom of legislation is not a factor which is relevant to its constitutionality and thus is not a matter which the courts will consider when legislation is under constitutional attack . . .
>
> "It is a mandate often repeated in the decisions of the courts that the expediency of legislation is not a matter for judicial concern and that inexpediency does not warrant invalidation on constituional grounds. In judging the constitutionality of a particular statutory provision, it is not for the court to determine whether the provision comports well or ill with the purposes of the statute of which it is a part . . .
>
> "Propriety of legislation is not a factor going to its constitutional validity. And a statute or ordinance which is unnecessary is not for that reason unconstitutional; indeed, in determining the constitutional validity of legislation, the courts are unconcerned with issues as to the necessity for the enactment of the legislation in question . . .
>
> "One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature."

Texas has "termed" marijuana a narcotic drug in Article 725b, Texas Penal Code. Proper notice is given to its citizens of the classification and that they will be

punished for possession and trafficking in marijuana and the wisdom of the legislature, in calling or classifying marijuana as a narcotic, cannot be questioned. Texas could properly include tobacco in the statute and no constitutional principle would be offended or contravened.

Moreover, the wisdom of the Texas Legislature in setting penalties for marijuana should not be replaced by judicial wisdom and feeling as to the proper penalty to be affixed.

In *McCray v. United States,* 195 U. S. 27 (1907), the act of Congress in placing a prohibitive tax on artificially colored margarine was considered by this Court. It was argued that Congress had arbitrarily discriminated against oleomargarine in favor of butter for the benefit of the butter industry. This Court stated at pages 53, 54 and 55:

> "Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, *no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.* To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only

charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overturn the entire distinction between legislative, judicial and executive departments of the governments, upon which our system is founded, and would be a mere act of judicial usurpation."

This Court repeated the rule in *Ferguson v. Skrupa,* 372 U. S. 726 (1963) as follows:

". . . the doctrine that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long been discarded. We have returned to the original constitutional propostion that courts do not substitute their social economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . .

". . . we are not concerned with the wisdom, need or appropriateness of the legislature."

Finally, in dealing with the control of marijuana, this Court observed in *Leary v. United States,* 395 U. S. 6 (1969) (while holding that the marijuana statutes, under consideration, violated a defendants' right against self-incrimination) at page 54:

"We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means."

Clearly, the states as well as Congress have the power to control traffic in marijuana. Given the power, thelegislative wisdom of the Texas Legislature is terming marijuana a "narcotic drug" and in seeting penalties is not for the courts to re-examine under any form of Constitutional attack.

2. *The Penalties For Possession of Marijuana And The Consequences That Flow From This Possession Under The Texas Scheme Of Regulation Are Not Unduly Harsh And Do Not Constitute Cruel And Unusual Punishment As Forbidden By The Eighth Amendment Of The United States Constitution.*

The primary thrust of Petitioner's entire argument in this case is that marijuana is not a dangerous substance, that its use is not harmful to the physical well-being and mental stability of the user, and that accordingly, penalties for the possession of marijuana in one's homes violates the First Amendment guarantee of freedom of expression and the Eighth Amendment's prohibition against creul and unusual punishment.

Petitioner cites much authority for the proposition that marijuana is not a dangerous substance and asserts that there are no adverse effects to the user.

However, the authorities are not uniform in postulating the deleterious consequences of marijuana use, and the more recent studies have indicated that

marijuana can cause lasting physicological and psychological harm.

Perhaps the most recent discussion of the adverse effects of marijuana use was before the Sub-Committee on Internal Security, Committee on the Judiciary, of the United States Seante in May of this year. Various witnesses testified to the perhaps irrversible, harmful impact of the sbustance, both psychologically and physically, and many distinguished witnesses concluded that marijuana usuage constitutes a major public health problem. See especially the testimony of Dr. Gabriel Nahas, M. D., Ph.D., Dr. Martin A. Stenchever, Philip Zeidenberg, M. D., Ph.D., Andrew I. Malcholm, M. D., F. R. C. P. (C), Robert D. Heath, M. D., M. Sci., W. D. M. Paton, Professor of Pharmacology, University of Oxford, Dr. Robert C. Kolodny, Director, Infertility Program, Reproductive Biology Research Foundation, St. Louis, Missouri, and Henry Bril, M. D.

The testimony of the witnesses mentioned above and that of others, affirmatively demonstrated the very distinct and real possibility that the use of marijuana causes harmful mental and psychological changes in users and that resultant public health and social problems follow.

Society is entitled to protect itself from the consequences of marijuana use and the decision of the Texas Legislature to classify marijuana as a drug and to set penalties which may be in excess of those from other jurisdictions should not be judicially questioned.

Given the possible social problems caused by the use of marijuana and the right of the Texas Legislature to act toward alleviating this problem, the other contentions made by Petitioner in his brief disappear.

CONCLUSION

For the reasons advanced above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Philip D. Hardberger, Attorney at Law, 119 Villita, San Antonio, Texas and Mr. Jack M. McGinnis, Attorney at Law, 7900 Callaghan Road, Suite 150, San Antonio, Texas on this the _____ day of August, 1974.